Supreme Court, U.S.
FILED
99 887 NOV 23 1999
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

RALPH RICHARDSON,

Petitioner,

v.

JANET RENO, Attorney General, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT E. JUCEAM
Of Counsel

IRA J. KURZBAN*
HELENA TETZELI
KURZBAN, KURZBAN, WEINGER & TETZELI, P.A.
2650 S.W. 27th Avenue
Miami, Florida 33133
(305) 444-0060

Attorneys for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

23388

QUESTIONS PRESENTED

On July 14, 1999, a panel of the Eleventh Circuit Court of Appeals determined: (i) that the statutory writ of habeas corpus is no longer available to review Executive detention of lawful permanent residents; (ii) that a lawful permanent resident for over thirty years is not permitted to have a bond hearing before an immigration judge simply because a regulation of the Immigration and Naturalization Service treats him as an arriving alien; (iii) that the only review available of the denial of the right to a bond hearing is at the end of the immigration removal process when review of detention issues would be meaningless; and (iv) that even if such review is not then available because of other preclusion statutes, withdrawing the statutory writ of habeas corpus does not violate the Suspension Clause, the Due Process Clause of the Fifth Amendment, or Article III of the Constitution. In light of these rulings, which have once before been vacated by this Court, 119 S.Ct. 2016 (1999), Mr. Richardson files this second petition for writ of certiorari on the following grounds:

1. Whether the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 abolished the statutory writ of habeas corpus, 28 U.S.C. §2241, as a means to review Executive detention of lawful permanent residents in violation of the United States Constitution, and if so, whether the Suspension Clause and the Due Process Clause of the Fifth Amendment of the United States Constitution permit the abolition of such review?

2. Whether an INS regulation that deprives a lawful permanent resident of the United States the right to an impartial hearing on his request for bond during removal proceedings is contrary to *Kwong Hai Chew v. Colding*, 344 U.S. 590

QUESTIONS PRESENTED – Continued

(1953), *Rosenberg v. Fleuti*, 374 U.S. 449 (1963) and the Fifth Amendment to the United States Constitution?

PARTIES

The parties to these proceedings are:

Ralph Richardson, Petitioner

Janet Reno, Attorney General

Doris Meissner, Commissioner, Immigration and Naturalization Service

Robert Wallis, District Director, Immigration and Naturalization Service

United States Immigration and Naturalization Service

United States Department of Justice

Executive Office of Immigration Review, Department of Justice

TABLE OF CONTENTS

Page

Questions Presented i

Parties iii

Opinion Below 1

Jurisdiction 2

Constitutional And Statutory Provisions Involved 2

Statement 2

Statutory And Regulatory Scheme 3

Statement Of The Case 6

Reasons For Granting The Writ 14

I. The Eleventh Circuit's Jurisdictional Ruling Directly Conflicts With The Decisions Of The Seventh And Fifth Circuits On The Continuing Availability Of Statutory Habeas Under 28 U.S.C. §2241 To Review Whether INS Detention Is Unconstitutional 15

II. The Eleventh Circuit's Decision That The Writ Of Habeas Corpus Under 28 U.S.C. §2241 Has Been Abolished And May Not Be Used To Review The Constitutionality Of The Detention Of Long Term Lawful Permanent Residents Directly Conflicts With This Court's Opinions In *Ex Parte Yerger, Felker v. Turner* And *Swain v. Pressley* And Raises An Issue Of Fundamental Importance That Has A Profound Effect On Thousands of Aliens Currently In Detention 17

TABLE OF CONTENTS – Continued

Page

III. The Eleventh Circuit's Determination Depriving A Lawful Permanent Resident Of The Right To A Bond Hearing Before A Neutral Magistrate Merely Because Of An INS Regulation Characterizing Him As An Arriving Alien Deprives Him Of His Right To Due Process And Directly Conflicts With This Court's Decisions In *Kwong Hai Chew v. Colding* And *Rosenberg v. Fleuti* 25

Conclusion 30

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Accardi v. Shaughnessy, 347 U.S. 216 (1954) 25

Almendarez-Torres v. United States, 118 S.Ct. 1219 (1998) 21

Bailey v. United States, 516 U.S. 137 (1995) 21

Bell v. Burson, 402 U.S. 535 (1971) 29

Ex Parte Bollman, 8 U.S. (4 Cranch) 75 (1807) 18

Bridges v. Wixon, 326 U.S. 135 (1945) 25

Cabreja-Rojas v. Reno, 999 F.Supp. 493 (S.D.N.Y 1998) 18

Carlisle v. Landon, 73 S.Ct. 1179 (1953) 5

Carlson v. Landon, 342 U.S. 524 (1952) 29

Dalis v. Brady, 766 F. Supp. 901 (D. Colo. 1991) 5

Doherty v. Thornburgh, 943 F.2d 204 (2nd Cir. 1991) 18

Ekekhor v. Aljets, 979 F.Supp. 640 (N.D. Ill. 1997) 19, 28

Felker v. Turpin, 518 U.S. 651 (1996) 9, 17, 18, 19

Foucha v. Louisiana, 504 U.S. 71 (1992) 28

Fuentes v. Shevin, 407 U.S. 67 (1972) 29

Goldberg v. Kelly, 397 U.S. 254 (1970) 29

Goncalves v. Reno, 144 F.3d 110 (1st Cir. 1998) cert. denied, 119 S.Ct. 1140 (1999) 16

Gornicka v. I.N.S., 681 F.2d 501 (7th Cir. 1982) 5, 22

Harris v. Nelson, 394 U.S. 286 (1969) 17

TABLE OF AUTHORITIES – Continued

Page

Hendersen v. I.N.S., 157 F.3d 106 (2nd Cir. 1998) cert. denied, 119 S.Ct. 1141 (1999) 16

Hose v. I.N.S., 161 F.3d 1225 (9th Cir. Dec. 2, 1999) ..1, 10

I.N.S. v. National Center for Immigrants Rights, Inc., 502 U.S. 183 (1991) 21, 22

I.N.S. v. Cardoza-Fonseca, 480 U.S. 421 (1987) 21

Jean v. Nelson, 472 U.S. 846 (1985) 6, 18, 22, 24

Jurado-Gutierrez v. Greene, 190 F.3d 1135 (10th Cir. 1999) 16

Kwong Hai Chew v. Colding, 344 U.S. 590, 73 S.Ct. 472 (1953) 12, 22, 25, 26, 27, 28

LaGuerre v. Reno, 164 F.3d 1035 (7th Cir. 1998) 15

Landon v. Plasencia, 459 U.S. 21, 103 S.Ct. 321 (1982) 25, 26, 27, 28

Leader v. Blackman, 744 F.Supp. 500 (S.D.N.Y. 1990) 19

Marcello v. Bonds, 349 U.S. 302, 75 S.Ct. 757 (1955) 27

Martinez et al. v. Greene, 28 F.Supp.2d 1275 (D.Colo. 1998) 18

Mathews v. Eldridge, 424 U.S. 319 (1976) 27, 28

Mayers v. U.S.I.N.S., 175 F.3d 1289 (11th Cir. 1999) 17

Montero v. Cobb, 937 F.Supp. 88 (D. Mass. 1996) 19

Nishimura Ekiu v. United States, 142 U.S. 651 (1892) 18

Matter of Patel, 15 I&N Dec. 666 (1976) 27

Pennsylvania Dept. of Corrections v. Yeskey, 118 S.Ct. 1952 (1998) 21

TABLE OF AUTHORITIES – Continued

Page

Parra v. Perryman, 172 F.3d 954 (7th Cir. 1999) 15, 16

Pak v. Reno, ___ F.3d ___ (6th Cir. Oct. 6, 1999), 1999 WL 791660 16

Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. ___, 119 S.Ct. 936 (1999).... 1, 2, 12, 13

Reno v. Flores, 507 U.S. 292 (1993) 22, 25, 29

Richardson v. Reno, 119 S.Ct. 2016 (1999) 2

Richardson v. Reno, 180 F.3d 1311 (11th Cir. 1999) ..... *passim*

Richardson v. Reno, 162 F.3d 1338 (11th Cir. 1998) 1, 17, 22, 27

Richardson v. Reno, 994 F.Supp. 1466 (S.D. Fla. 1997) 1

Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981) 18

Rosenberg v. Fleuti, 374 U.S. 449 (1963) 9, 25, 27, 28, 30

Shah v. Reno, 184 F.3d 719 (8th Cir. 1999) 16

Shaughnessy v. Mezei, 345 U.S. 206 (1953) 6, 18

St. John v. McElroy, 917 F.Supp. 243 (S.D.N.Y. 1996) ..19, 28

Sandoval v. Reno, 166 F.3d 225 (3rd Cir. 1999) 16

Swain v. Pressley, 430 U.S. 372 (1977) 13, 17, 23, 24

United States v. Salerno, 481 U.S. 739 (1987) 28, 29

Van Eeton v. Beebe, 49 F.Supp.2d 1186 (D. Or. 1999) 18

Ex parte Watkins, 28 U.S. (8 Peters) 193 (1830) 18

Wong Yang Sung v. McGrath, 339 U.S. 33, 70 S.Ct. 445 (1950) 26

TABLE OF AUTHORITIES – Continued Page

Ex Parte Yerger, 75 U.S. (8 Wall) 332 (1869).....17, 19

Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999)..15, 16

ADMINISTRATIVE DECISION

Matter of Joseph, Int. Dec. #3387 (BIA 1999) 5

Matter of Valles, Int. Dec. #3306 (BIA 1996)..... 5

FEDERAL STATUTES

8 U.S.C. §1101(a)(13)(C)..... 2

8 U.S.C. §1105a.....18, 23

8 U.S.C. §1182(d)(5)..... 6

8 U.S.C. §1226.....3, 4

8 U.S.C. §1226(c) 2, 3

8 U.S.C. §1226(e) 2, 4

8 U.S.C. §1229a..... 4

8 U.S.C. §1252(a)(1)..... 2

8 U.S.C. §1252(a)(2)(C)..... 2

8 U.S.C. §1252(b) 5

8 U.S.C. §1252(b)(1)..... 2

8 U.S.C. §1252(b)(2).....2, 23

8 U.S.C. §1252(b)(9)..... 2

8 U.S.C. §1252(e)(2).....2, 23

8 U.S.C. §1252(g) 2

28 U.S.C. §2241..... *passim*

TABLE OF AUTHORITIES – Continued

Page

INA §101(a)(13) 9
INA §101(a)(47) 21
INA §106(a)(10) 23
INA §212(d)(5) 6
INA §236 ..... 4, 19, 21
INA §236(a) 3, 4, 8, 21
INA §236(c)(1) 18
INA §236(e) ..... *passim*
INA §240 4
INA §240A 4
INA §242 ..... 13, 19, 21
INA §242(a)(1) 4, 20
INA §242(a)(2)(B)(ii) 4
INA §242(a)(2)(C) 4, 11, 20
INA §242(b) 4, 20
INA §242(b)(2) 13, 23
INA §242(b)(9) 4, 13, 19, 21, 23
INA §242(e)(2) 13, 23
INA §242(g) ..... *passim*

MISCELLANEOUS

Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 Conn. L. Rev. 1411 (1997) 19

Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. Rev. 143 (1952) 17

TABLE OF AUTHORITIES – Continued

Page

U.S. Const. art. I, §9, cl. 2 17

H.R. Conference Report, 104-828, 104th Cong. 2nd Sess. 20

Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) ..... *passim*

Immigration and Nationality Act ("INA") ..... *passim*

Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961 (1998) 17, 18

FEDERAL REGULATIONS

8 C.F.R. §1.1(q) 2, 4

8 C.F.R. §3.14 5

8 C.F.R. §3.19 ..... 4, 5, 14

8 C.F.R. §3.19(a) 7, 30

8 C.F.R. §3.19(d) 2, 5, 7, 29

8 C.F.R. §3.19(f) 2

8 C.F.R. §3.19(g) 2

8 C.F.R. §3.19(h) 3

8 C.F.R. §3.19(h)(2)(i)(B) 2, 4

8 C.F.R. §236.1 ..... 4, 7

8 C.F.R. §236.1(c)(1)(i) 2

8 C.F.R. §236.1(c)(5)(i) 2, 7

8 C.F.R. §236.1(d) 2, 5

8 C.F.R. §240.2(b) 5

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Ralph Richardson, respectfully petitions for a writ of certiorari.

OPINIONS BELOW

The decisions of the Immigration Judge determining he had no jurisdiction to decide Mr. Richardson's request for bond are unreported. (Appendix ("App.") 171-72, 174). The report and recommendation of the United States Magistrate Judge granting the writ of habeas corpus regarding Mr. Richardson's detention is unreported. (App. 136). The decision of the United States District Court for the Southern District of Florida finding that the writ of habeas corpus under 28 U.S.C. §2241 is not repealed by the Illegal Immigration Reform and Immigrant Responsibility Act and ordering the immigration court to provide Mr. Richardson with an individualized bond hearing is reported at 994 F.Supp. 1466 (S.D. Fla. 1997) (App. 122-35). On February 23, 1998, the court of appeals granted the respondents' emergency motion for a stay in an unreported order. (App. 121). In this Court, Justice Kennedy denied Mr. Richardson's application to vacate the stay. (App. 120). On December 9, 1998, the court of appeals entered its opinion, which is unreported. On December 22, 1998, the court of appeals entered an amended opinion that is reported at 162 F.3d 1338 (11th Cir. 1998) (App. 18-118). (*Richardson I*). The amended opinion modified the appeals court's original opinion only in minor ways related to the decision of the Ninth Circuit Court of Appeals to vacate its opinion in *Hose v. I.N.S.*, 161 F.3d 1225 (9th Cir. Dec. 2, 1998), which the panel had relied upon in this case. (App. 19).

A petition for writ of certiorari was filed with this Court on February 23, 1999. On April 26, 1999, the Solicitor General agreed with the Petitioner that the decision of the Eleventh Circuit should be vacated in light of this Court's opinion in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. ___, 119 S.Ct. 936 (1999). On June 1, 1999, this Court granted certiorari, vacated the decision, and remanded the case to the Eleventh Circuit for further consideration in

light of *Reno v. American-Arab Anti-Discrimination Committee*. 119 S.Ct. 2016 (App. 173).

On July 14, 1999 a panel of the Eleventh Circuit reinstated its order. *Richardson v. Reno*, 180 F.3d 1311 (11th Cir. 1999), (App. 1-17) (*Richardson II*). The Circuit Court, thereafter, denied rehearing and rehearing en banc on August 25, 1999. (App. 177).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reprinted in an appendix to this petition are pertinent portions of the Suspension of Habeas Corpus Clause of the Constitution, the Due Process Clause of the Fifth Amendment, the Eighth Amendment, provisions of Title 8, including 8 U.S.C. §§1101(a)(13)(C), 1226(c), and (e), 1252(a)(1), 1252(a)(2)(C), 1252(b)(1), (2), (9), (e)(2), and (g), the statutory writ of habeas corpus, 28 U.S.C. §2241, 8 C.F.R. §§1.1(q) and 3.19(d), (f), (g), and (h)(2), 236.1(c)(1)(i), (c)(5), and (d) and the Transition Period Custody Rules. (App. 178-92).

STATEMENT

Mr. Richardson has now been detained for over two years by the INS District Director without any opportunity for an impartial hearing on bond pending a final determination in his removal proceeding. This case presents the issue of whether a person may be incarcerated without any possibility of a hearing before a neutral magistrate to determine bond and then deprived of the right to challenge that denial in federal court. There are two issues. First, whether Congress has withdrawn the writ of habeas corpus under 28 U.S.C. §2241 to review Executive detention that is unconstitutional. Second, whether the existence of an INS regulation which bars a long term

lawful permanent resident from receiving a bond hearing before a neutral hearing officer simply because he was seeking entry into the United States, but grants the same hearing to a lawful permanent resident in the United States, violates the Constitution.

THE STATUTORY AND REGULATORY SCHEME

In 1996, Congress established a separate provision under the Immigration and Nationality Act ("INA"), section 236, 8 U.S.C. §1226 regarding the Apprehension and Detention of Aliens. Section 236(a) of the statute provides for the detention, and in the Attorney General's discretion, the release of aliens during the course of their removal proceedings. INA §236(c), 8 U.S.C. §1226(c) provides for the mandatory detention of persons with criminal records. The mandatory detention provision, under current INS' interpretation, however, only applies to persons who have not yet completed their criminal sentences and therefore does not apply to persons such as Mr. Richardson who completed his criminal sentence many years before his immigration detention.

In cases not subject to mandatory detention, the immigration court, under INS regulations, is authorized to grant a bond hearing to persons subject to removal proceedings. The regulations except certain classes of aliens from the right to a bond hearing. 8 C.F.R §3.19(h). Lawful permanent residents who are in the United States are *not* excepted and are entitled to a bond hearing before an immigration judge whether or not they have a conviction if they are not subject to mandatory detention. However, lawful permanent residents who have a prior conviction, who travel outside of the United States, even for a brief and innocent purpose, are denied the right to a bond hearing before an immigration judge if they are stopped at the border. They are denied the right to a bond hearing even if they are *not* subject to mandatory detention. Under INS regulations, a lawful permanent resident with an old conviction who is stopped at the border is treated as an "arriving alien," who by definition is deprived of the right to a bond

hearing before an immigration judge. 8 C.F.R. §§1.1(q), 3.19(h)(2)(i)(B).

Congress also added a preclusion statute to the bond and detention provisions. INA §236(e), 8 U.S.C. §1226(e). This section provides that the Attorney General's discretionary judgment regarding the application of the section "shall not be subject to review." It also provides that: "No court may set aside any action or decision by the Attorney General . . . regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." *Id.*

The provisions concerning custody and bond, however, were placed separate and apart from the provisions regarding removal proceedings in IIRIRA. *Compare* INA §236, 8 U.S.C. §1226 *with* INA §240A, 8 U.S.C. §1229a. Removal proceedings have their own separate procedures unrelated to detention and bond. For example, INA §240 and §240A provide for elaborate procedures governing the initiation of removal proceedings, the nature of the proceedings themselves, and the failure to appear at such proceedings. These are unrelated to the detention and bond proceedings set forth in INA §236(a) and the attendant regulations, 8 C.F.R. §§3.19, 236.1.

Similarly, removal proceedings have their own distinct review provisions, pursuant to which a "final order of removal" may be reviewed only in the court of appeals. *See* INA §242(a)(1). The statute governing the review of final orders of removal, INA §242(a), also includes various preclusion of review provisions separate and apart from INA §236(e). For example, INA §242(a)(2)(C) prohibits persons with final orders of removal who have certain criminal convictions from appealing their cases to the courts of appeals and INA §242(a)(2)(B)(ii) restricts review of discretionary decisions of the Attorney General. Congress also provided special "requirements" concerning the "review of an order of removal" when the order was not precluded by statute. INA §242(b). Under INA §242(b)(9), for example, all questions of law and fact are consolidated when reviewing final orders of removal. This section does not preclude review but simply sets forth the *procedures* necessary for the review of *final orders*.

The statutes separating removal/deportation proceedings from custody and bond proceedings, both in form and substance, recognize a long standing practice of the Department of Justice that custody determinations "shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding." 8 C.F.R. §3.19(d). Detention and bond issues have always been considered separate and distinct from removal proceedings: (1) by regulation, *compare* 8 C.F.R. §3.19(d) [Custody determinations "shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding"] *with* §3.14 ["Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service . . . However, no charging document is required to be filed with the Immigration Court to commence bond proceedings pursuant to §§3.19, 236.1(d) and 240.2(b) of this chapter."]; (2) by BIA precedent, *Matter of Valles*, Int. Dec. #3306 (BIA 1996) ["Bond proceedings differ greatly from other immigration proceedings"]; *Matter of Joseph*, Int. Dec. #3387 (BIA 1999) ["Section 236 of the Act governs the apprehension and detention of aliens during removal proceedings." "[A] merits case appeal will not stay an Immigration Judge's release order"] and (3) by federal court precedent, *Gornicka v. I.N.S.*, 681 F.2d 501, 506 (7th Cir. 1982) ["Thus it is clear bond hearings are separate and apart from deportation hearings. . . . Whether or not bond is required has no bearing on whether a final order of deportation will be entered. A bond determination is not a final order of deportation, is not made during an administrative proceeding under §1252(b), and does not effect the deportation proceeding."]; *Dalis v. Brady*, 766 F. Supp. 901, 903, 905 (D. Colo. 1991). Even where statutes mandated the removal of communist aliens, persons facing such removal could separately challenge their detention by a writ of habeas corpus. *Carlisle v. Landon*, 73 S.Ct. 1179 (1953) (Douglas, J.). Similarly, the writ of habeas corpus was traditionally used to review the detention of inadmissible aliens who, like Mr. Richardson, were separately challenging their inadmissibility

into the United States. *Jean v. Nelson*, 472 U.S. 846 (1985); *Shaughnessy v. Mezei*, 345 U.S. 206 (1953).

STATEMENT OF THE CASE

The Petitioner, Ralph Richardson, entered the United States in 1968 as a lawful permanent resident at two years of age. (App. 123). He has resided in the United States continuously for thirty-one years. He has a wife and three young children, all of whom are United States citizens. (App. 123). He and his family have lived in Georgia for many years, and it is where he owned and operated a successful professional cleaning service. (App. 123). At the request of his mother, Mr. Richardson made a 48-hour trip outside of the United States in October, 1997, for the first time since his entry into the country in 1968. (App. 123). Upon his return, he was detained by the INS because of prior convictions, of which he informed INS officials when questioned. (App. 138). Specifically, Mr. Richardson was convicted of carrying a pocket knife (concealed weapon) at the age of 18. He was convicted of possession of marijuana on two occasions and carrying a concealed weapon. These charges were recently vacated by the Florida state court. He was later convicted of a narcotics related felony that included violating his probation. He had been released from all criminal proceedings almost four years before he was arrested at the airport by the INS. (App. 123, 138). On October 27, 1997, the INS incarcerated him at the Krome Detention Center in Miami, Florida "without opportunity for release on bond while it instituted removal proceedings." (App. 123).

On November 13, 1997, Mr. Richardson submitted a parole request by letter to the District Director in Miami, Florida, seeking his release pending removal proceedings. (App. 124). The District Director, as the prosecuting official, was authorized to grant temporary parole under INA §212(d)(5), 8 U.S.C. §1182(d)(5).

In response to the written parole request, the "Acting Officer in Charge" of the INS detention facility issued a perfunctory written form order on December 4, 1997, denying

parole to Mr. Richardson.[1] There was no provision for live testimony, witnesses, or an impartial hearing before the District Director as one would normally have in a bond determination and as Department of Justice regulations provide before an immigration judge. 8 C.F.R. §3.19(d). Several days after submitting the request, Mr. Richardson petitioned the immigration court, pursuant to 8 C.F.R. §3.19(a) and 236.1, to set a reasonable bond. The immigration court determined that it had no jurisdiction to grant Mr. Richardson a bond because he was an "arriving alien" under 8 C.F.R. §236.1(c)(5)(i). (App. 171, 174). Thereafter, Mr. Richardson sought to continue his hearing until the issue of bond was resolved. The immigration judge denied the motion on January 6, 1998, finding that the "[b]ond decision including Habeas is separate from immigration proceedings." (App. 175).

Mr. Richardson filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Florida. The original petition and the amended petition for writ of habeas corpus asserted statutory and constitutional claims under the Fifth and Eighth Amendments directed exclusively to Mr. Richardson's detention. Mr. Richardson sought review of the immigration judge's decision that he lacked jurisdiction to make a bond determination. (App. 171-172). As the court of appeals noted, Mr. Richardson did not seek review of any INS discretionary decision regarding bond, but instead sought "review of his constitutional claim that denial of bond without a hearing before an immigration judge violates his constitutional rights." (App. 48-49). Mr. Richardson asserted that the immigration judge's and the INS' interpretation of the statute and the regulations, "by wholly depriving lawful permanent residents . . . of the right to

---

[1] A second, more extensive letter denying parole was presented for the first time to the Magistrate Judge and Mr. Richardson at a December 15, 1997, district court hearing. This *post hoc* litigation document, also dated December 4, 1997, was used to buttress the first letter. It was extensively relied upon by the court of appeals (App. 38-39), although it was never in the record of proceedings before the district court but was merely attached to respondent's brief in the court of appeals.

present evidence concerning their suitability for bond, deprives them on its face of procedural due process under the Fifth Amendment of the United State Constitution. It also deprives Mr. Richardson of due process as applied because he could easily demonstrate his suitability for bond if given the opportunity to do so." (App. 162).

The habeas petition did not address, nor did the Magistrate Judge or the United States District Judge entertain or address, any issues regarding Mr. Richardson's removal proceedings. The INS seeks Mr. Richardson's permanent removal from the United States based upon his conviction for a narcotics-related felony. His removal proceeding and the appeal of that proceeding have continued separately to this day.[2]

At the time of Mr. Richardson's detention, he argued that the immigration court was required to provide a bond hearing and to issue a reasonable bond under both INA §236(a) or the Temporary Period Custody Rules, which were then in effect, and as a matter of longstanding constitutional law regarding lawful permanent residents. The INS regulations which characterized Mr. Richardson as an "arriving alien" were ultra vires of the statute and unconstitutional. Both the magistrate

---

[2] Although the court of appeals discussed Mr. Richardson's removal hearing in its first and second opinions (App. 49-50, 9 n.4), it was never an issue in this case. The immigration removal hearing and the appeal before the Board of Immigration Appeals were not part of the record in the case. The panel, subsequent to briefing and oral argument, requested the parties to submit a joint supplemental appendix of the removal proceeding, presumably so it could refer to it in the opinion. Moreover, the events in Mr. Richardson's removal hearing demonstrate why detention is correctly a separate matter from the underlying removal proceeding. Mr. Richardson has been required to remain in detention notwithstanding his success on appeal before the BIA remanding his case to the immigration judge. Although the immigration judge has recently ruled against Mr. Richardson, this issue is being appealed. Because the District Director is both the prosecuting authority and the person solely responsible to determine bond, Mr. Richardson, absent a bond hearing before some impartial forum, will be required to remain in detention for additional *years* while the parties fight over his removal case. In the end, his years in INS detention will far exceed those in his criminal proceedings.

judge and the district court judge agreed. Both prudently declined to reach the constitutional issues raised in Petitioner's amended complaint, thereby resolving the case on statutory grounds.

The district court, through Chief Judge Edward B. Davis, first addressed the court's jurisdiction to entertain the writ of habeas corpus. He recognized that there was a strong presumption favoring judicial review of administrative decisions that could only be overcome "by clear and convincing evidence" that IIRIRA stripped the courts of federal jurisdiction to review the right to a bond hearing. (App. 125-126). Recognizing that habeas corpus is subject only to "express" repeal under the "clear statement rule" expressed by this Court in *Felker v. Turpin*, 518 U.S. 651 (1996), the Chief Judge found that neither INA §236(e), nor §242(g) expressly repealed jurisdiction over the writ of habeas corpus. Finding no express repeal because the statute "does not even mention habeas corpus," the court appropriately declined to find repeal by implication. (App. 126-127).

The district court also rejected the respondents' contention that Mr. Richardson failed to exhaust his administrative remedies. Finding such administrative remedies "futile,"and that his continued detention constituted "irreparable harm," the district court concluded that exhaustion was unnecessary.

On the merits, the Chief Judge concluded that the respondents' administrative interpretation precluding Mr. Richardson from a bond hearing on the ground that he must be treated like an alien arriving in the United States for the first time "does violence" to the plain meaning of INA §101(a)(13) and is directly contrary to this Court's decision in *Rosenberg v. Fleuti*, 374 U.S. 449 (1963). Finding that "it is evident from the plain meaning of the statute, the legislative history and the important policy concerns that animated the Court in 1963 that *Fleuti* is still good law" (App. 134), the district court granted the writ of habeas corpus and ordered the immigration judge to provide Mr. Richardson with an individualized hearing. (App. 134-135).

The respondents sought an emergency stay in the Eleventh Circuit, claiming that Mr. Richardson should not be

given an individualized hearing, notwithstanding the district court's finding that his detention constituted irreparable harm. A stay was issued on February 23, 1998, and briefing was expedited, although oral argument was not granted until June 16, 1998.

On December 9, 1998, the panel reversed and vacated the district court judgment. On December 22, 1998, the court amended its opinion in recognition of the fact that the Ninth Circuit's decision in *Hose v. I.N.S.*, upon which it had relied, had been vacated. (App. 18-118). It nevertheless maintained the same position as it did in its December 9, 1998 opinion and ordered the reversal and vacation of the district court order.

The court concluded that the statutory writ of habeas corpus under 28 U.S.C. §2241 has been abolished in regard to Executive detention of resident aliens with certain prior convictions. The court determined that the language of INA §242(g), although never mentioning detention, bond, or parole, was "plain and clear," (App. 60) and that the phrase "notwithstanding any other provision of law" abolished the writ of habeas corpus because it "sufficiently and clearly encompasses other provisions of law, such as §2241." (App. 60). The court made this determination, notwithstanding INA §236(e), which directly addressed limitations on judicial review regarding bond and parole.[3] In the panel's view, issues of bond and detention were "inextricably part of the removal proceedings" and therefore covered by INA §242(g). (App. 63-64 n.100). Untroubled by the need to avoid the serious constitutional question that elimination of the writ of habeas corpus might raise, the panel "reject[ed] this 'constitutional avoidance' approach because the language of INA §242(g) "in our view, is plain, unambiguous, and yields only one permissible statutory construction" (App. 68) and because the

---

[3] The panel determined that INA §236(e) did not bar Mr. Richardson's claim because he "is not actually seeking review of . . . INS discretionary decisions but instead review of his constitutional claim that denial of bond without a hearing before an immigration judge violates his constitutional rights." (App. 48-49).

elimination of habeas jurisdiction over mandatory Executive detention "does not violate the Due Process Clause and Article III [as] neither provision mandates judicial review of immigration decisions." (App. 17).

The panel also found that withdrawing all review from the lower federal courts to hear Mr. Richardson's claim of unlawful Executive detention does not violate Article III. In its view, "Article III does not mandate the judicial review of immigration decisions in any inferior court" because "Congress possesses the sole authority to establish the jurisdiction of the inferior federal courts." (App. 78).

The court next turned to the Suspension Clause. It determined that the Suspension Clause is not violated by the elimination of statutory habeas review. It also determined that the statutory bar to circuit court review of final removal orders for aliens with certain convictions under INA §242(a)(2)(C) does not violate the Suspension Clause. In reaching its conclusion, the panel maintained that "the Suspension Clause permits Congress to replace habeas corpus with another avenue of judicial review as long as that alternative vehicle is adequate and effective." (App. 106). The court determined that an adequate and effective remedy exists in the court of appeals after a final order of removal to review Mr. Richardson's detention. (App. 106-112). It determined that INA §242(a)(2)(C) does not bar review because inquiry may still be made in the court of appeals as to whether Mr. Richardson is an alien, is removable, and has committed a criminal offense. The panel believed that an inquiry limited to these questions "goes a long way, and very well may be sufficient in this particular type of case, to provide an adequate and effective collateral judicial review of the validity of Richardson's executive detention and removal order." (App. 113-114). Moreover, the court concluded that even if INA §242(a)(2)(C) bars review, there would still be review to determine whether "the level of judicial review remaining . . . in a particular case satisfies the Suspension Clause." (App. 117). Deferring this form of review of Mr. Richardson's then sixteen-month detention until the entry of a final removal

order, in the panel's view, "d[id] not raise substantial constitutional concerns." (App. 104).

Although the panel resolved the case on jurisdictional grounds, it nevertheless addressed (presumably as dicta) Mr. Richardson's due process concern regarding the deprivation of a bond hearing before an immigration judge. The panel acknowledged that permanent resident aliens "are protected by the Due Process Clause of the Fifth Amendment." (App. 74). It "disagree[d]" with Mr. Richardson's claim, however, that "limiting his bond requests . . . to written requests to the INS district director, without any judicial review by an immigration judge, deprives him of due process." (App 76). Ignoring the District Director's dual role as prosecutor and adjudicator, the Eleventh Circuit, utilizing the *Mathews v. Eldridge,* analysis found that Mr. Richardson was not deprived of due process because: (1) Mr. Richardson's liberty interest was "weighty, although slightly attenuated given his resident alien status," (2) the "risk" of an erroneous decision was "low" and (3) the INS' interest was "fairly high" in its district director's being able to make parole and bond decisions. (App. 76-77). It also confused bond determinations and removal proceedings in attempting to distinguish *Kwong Hai Chew v. Colding,* 344 U.S. 590, 73 S.Ct. 472 (1953) by asserting that *Kwong Hai Chew* did not control this case because "Richardson has been afforded extensive procedural safeguards in his *removal proceeding.*" (App. 74-75 n.114) (emphasis added).

A petition for writ of certiorari seeking review of the Eleventh Circuit's decision was filed with this Court on February 23, 1999. During the pendency of the petition, this Court decided *Reno v. American-Arab Anti-Discrimination Committee,* 119 S.Ct. 936 (1999) which rejected the broad analysis of INA §242(g) advanced by the Eleventh Circuit. On April 26, 1999, the Solicitor General agreed with the Petitioner that the decision of the Eleventh Circuit should be vacated in light of this Court's opinion in *Reno.* On June 1, 1999, this Court granted certiorari, vacated the decision, and

remanded the case to the Eleventh Circuit for further consideration in light of *Reno v. American-Arab Anti-Discrimination Comm.*, 119 S.Ct. 2016, (App. 173).

On July 14, 1999, a panel of the Eleventh Circuit reinstated its order on a different ground. *Richardson v. Reno*, 180 F.3d 1311 (11th Cir. 1999) (*Richardson II*), (App. 1-17). The Eleventh Circuit recognized that Richardson's §2241 petition does not involve any of the "three discrete actions" addressed in *Amercian-Arab Anti-Discrimination Committee* and that in light of that case "INA §242(g) does not apply." (App. 5). Nevertheless, it determined that statutory habeas jurisdiction has been abolished to review detention decisions, this time relying "on INA §242(b)(9) rather than INA §242(g), as the expression of congressional intent to preclude §2241 jurisdiction in this situation." (App. 8). It found that INA §242 *et seq.* constituted a "sufficiently broad and general limitation of federal jurisdiction to preclude §2241 jurisdiction." (App. 8-9). The panel determined that "Richardson's statutory and constitutional claims regarding his detention are clearly encompassed within INA §242(b)(9)" because "the plain language of INA §242(b)(9) applies to detention proceedings insofar as they arise from the removal proceedings." (App. 14-16).[4]

The panel next turned its attention to Mr. Richardson's claim that under *Swain v. Pressley*, 430 U.S. 372 (1977), there must be an adequate and effective remedy if habeas review is eliminated. Mr. Richardson argued that awaiting review of detention decisions until the end of the removal process in the court of appeals is not effective because it renders any decision meaningless as he will either be released if he wins his

---

[4] The court also found that INA §§242(b)(2) and 242(e)(2) are sources of federal preclusion without stating definitively that they preclude review in this case. (App. 9). It also reversed its previous determination that INA §236(e) was inapplicable to Mr. Richardson because he was not seeking review of a discretionary determination. (App. 15 n.10) However, it declined to reach the issue of whether INA §236(e) would preclude review in this case, perhaps saving it for a third round of appeals to this Court. *Id.*

removal hearing or deported if he loses it. The Eleventh Circuit disagreed speculating that the effective remedy *might* be a decision of a court of appeals to address the bond issue before the merits determination stating: "[t]here is no reason why a bond claim cannot or will not be decided before any other issues in the case. Although not required to do so, a court of appeals could address any bond issue early in the appeal before the issues relating to the removal order itself are decided or even briefed." (App. 16 n.12).

Having once again determined that the district court lacked jurisdiction, it dismissed Mr. Richardson's §2241 petition. Mr. Richardson thereafter timely filed a petition for rehearing and rehearing en banc which was denied on August 25, 1999. (App. 177).[5]

REASONS FOR GRANTING THE WRIT

After two years of seeking administrative and judicial assistance to challenge the unconstitutionality of his detention, Mr. Richardson invokes the writ of certiorari to seek review of the Eleventh Circuit's decision, which has profound implications for all persons currently detained by the Immigration and Naturalization Service ("INS") awaiting removal proceedings. The Eleventh Circuit's determination that the statutory writ of habeas corpus was abolished by IIRIRA and that awaiting review of detention until the end of all removal proceedings is an adequate and effective remedy is contrary to the history and purpose of the writ of habeas corpus, to the

---

[5] On June 28, 1999, Mr. Richardson's counsel, once again, requested bond because the BIA had reversed Mr. Richardson's order of removal and had granted him a new hearing. On July 21, 1999, the District Director issued a bond which he revoked several days later. Mr. Richardson sought review of the bond issue once again before the immigration judge which the INS opposed. On August 3, 1999, the immigration judge designated to hear the bond matter determined that he had no jurisdiction to hear Mr. Richardson's claim for bond because he is "an arriving alien in removal proceeding" and "is not eligible" for a bond redetermination under 8 C.F.R. §3.19. (App. 175).

language and legislative history of IIRIRA, and to the traditional distinction in immigration law between issues concerning bond and those concerning final deportation/removal orders. The decision to forestall review of detention until the end of the removal process renders such review illusory for Mr. Richardson and the thousands of aliens who will be detained for prolonged periods of time if the Eleventh Circuit's decision is allowed to stand.

I. The Eleventh Circuit's Jurisdictional Ruling Directly Conflicts With The Decisions Of The Seventh And Fifth Circuits On The Continuing Availability Of Statutory Habeas Under 28 U.S.C. §2241 To Review Whether INS Detention Is Unconstitutional

This Court should accept certiorari because there exists a clear split in the circuits on whether habeas corpus jurisdiction under 28 U.S.C. §2241 remains to review claims that INS detention is unconstitutional. The Eleventh Circuit's decision in this case is in direct conflict with the Seventh Circuit's decisions in *Parra v. Perryman*, 172 F.3d 954 (7th Cir. 1999) and conflicts with the reasoning of the Fifth Circuit in *Zadvydas v. Underdown*, 185 F.3d 279 (5th Cir. 1999).

In *Parra v. Perryman*, the Seventh Circuit found that there was jurisdiction to review an alien's constitutional challenge to his detention even though, like Mr. Richardson, he was in removal proceedings. Although the Seventh Circuit had determined that the statutory writ of habeas corpus was not available to review underlying claims in a deportation proceeding, *LaGuerre v. Reno*, 164 F.3d 1035 (7th Cir. 1998), it recognized that detention was different. In *Parra*, the court held that "claims concern[ing] detention while the administrative process lasts . . . may be resolved without affecting pending proceedings." *Parra*, 172 F.3d at 957. They rejected challenges based upon INA §§242(g) and 236(e) and then reached the merits of Mr. Parra's claim finding mandatory detention constitutional. This is in direct conflict with the decision in *Richardson II* finding that the statutory writ of

habeas corpus has been abolished for the review of any immigration detention decisions.

In *Zadvydas v. Underdown,* 185 F.3d 279 (5th Cir. 1999), the Fifth Circuit, agreeing with the Seventh Circuit in *Parra,* found that a person subject to INS detention could initiate a proceeding under §2241 to challenge his detention separate and apart from the underlying deportation proceeding. In *Zadvydas,* the habeas petitioner had a final order of deportation and was challenging the INS' right to continue his detention indefinitely where the likelihood of deportation seemed remote. The court rejected the notion that detention was the same as executing a removal order and rejected the conclusion that INA §242(g) precluded review. Addressing the analysis in *Parra,* the Court held that: "We agree, and find jurisdiction to hear this appeal." *Zadvydas,* 185 F.3d at 285.

The Eleventh Circuit's decision is not only in conflict with the Fifth and Seventh Circuits on the issue concerning habeas review of detention matters, but in principle conflicts with virtually every other circuit in regard to the continuing viability of §2241 to review certain immigration matters, notwithstanding IIRIRA's preclusion provisions. The First,[6] Second,[7] Third,[8] Fourth,[9] Sixth,[10] Eight,[11] and Tenth[12] Circuits have all determined that the statutory writ of habeas corpus has not been abolished under either the Anti-Terrorism and Effective Death Penalty Act or the transitional rules under IIRIRA. Although all of these cases are different than

---

[6] *Goncalves v. Reno,* 144 F.3d 110, 118-26 (1st Cir. 1998) *cert. denied,* 119 S.Ct. 1140 (1999)

[7] *Henderson v. I.N.S.,* 157 F.3d 106 (2nd Cir. 1998) *cert. denied,* 119 S.Ct. 1141 (1999)

[8] *Sandoval v. Reno,* 166 F.3d 225 (3rd Cir. 1999)

[9] *Bowrin v. U.S.I.N.S.,* ___ F.3d ___ (4th Cir. Oct. 20, 1999), 1999 WL 957725

[10] *Pak v. Reno,* ___ F.3d ___ (6th Cir. Oct. 6, 1999), 1999 WL 791660

[11] *Shah v. Reno,*184 F.3d 719 (8th Cir. 1999)

[12] *Jurado-Gutierrez v. Greene,* 190 F.3d 1135 (10th Cir. 1999).

Richardson I and *Richardson II* because they involve review of matters that arose in deportation proceedings and do not involve detention issues under the new removal statutes, the circuit courts in all of these cases relied on the clear statement rule announced by this Court in *Ex parte Yerger,* 75 U.S. (8 Wall) 332 (1869) and *Felker v. Turpin,* 518 U.S. 651 (1996) that habeas corpus jurisdiction is not abolished unless Congress expressly and clearly stated its intent to do so.[13]

II. The Eleventh Circuit's Decision That The Writ Of Habeas Corpus Under 28 U.S.C. §2241 Has Been Abolished And May Not Be Used To Review The Constitutionality Of The Detention Of Long Term Lawful Permanent Residents Directly Conflicts With This Court's Opinions In *Ex Parte Yerger, Felker v. Turner* And *Swain v. Pressley* And Raises An Issue Of Fundamental Importance That Has A Profound Effect On Thousands Of Aliens Currently In Detention

The fundamental right to test the legality of Executive detention in a habeas corpus proceeding is enshrined in the Constitution. U.S. Const. art. I, §9, cl. 2. This right to habeas corpus, whose object is to liberate those who are unlawfully detained, has been termed "the most important human right in the Constitution."[14] The "Great Writ" has a pre-eminent role in our constitutional system and "is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." *Harris v. Nelson*, 394 U.S. 286, 290

---

[13] Indeed, even the Eleventh Circuit has determined that §2241 remains to review pre-IIRIRA cases finding that Congress did not expressly abolish the writ. *Mayers v. U.S.I.N.S.*, 175 F.3d 1289, 1299 (11th Cir. 1999) ["Generally, repeal of jurisdictional provisions by implication is disfavored].

[14] Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution,* 32 B.U. L. Rev. 143 (1952); *see also,* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens,* 98 Colum. L. Rev. 961, 962 (1998) (writ of habeas corpus "a central constitutional safeguard against lawless arrest.").

(1969). Seeking to enforce this right, Congress created the lower federal courts and conferred upon them habeas jurisdiction in the Judiciary Act of 1789; that jurisdictional grant is now codified at 28 U.S.C. §2241. *See Felker v. Turpin*, 518 U.S. 651, 659 & nn.1, 2 (1996) (the habeas provision of the Judiciary Act of 1789 applied to persons in the custody of the United States and "is the direct ancestor of §2241.").

Throughout our history, this Court has recognized the preeminent role that the statutory writ of habeas corpus has played in safeguarding individual liberty during pretrial detention, even where treason was charged. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 125 (1807). The Great Writ and the statutory means to effectuate it has been recognized as "a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause." *Ex parte Watkins*, 28 U.S. (8 Peters) 193, 202 (1830). The protection of the writ has been extended not only to citizens, but also to aliens throughout the history of the Republic, and to aliens in federal immigration proceedings for as long as there have been federal immigration laws. *Jean v. Nelson*, 472 U.S. 846 (1985); *Shaughnessy v. Mezei*, 345 U.S. 206 (1953); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892); Neuman, *Habeas Corpus, Executive Detention and the Removal of Aliens*, *supra* at 989-1020.

Even after 1961, when Congress provided that the "sole and exclusive" remedy for review of deportation orders would be in the courts of appeals, *see former* 8 U.S.C. §1105a, this Court and the lower federal courts repeatedly recognized the right of an alien to challenge his detention by a writ of habeas corpus prior to the conclusion of his deportation or exclusion proceeding. *See, e.g., Jean v. Nelson, supra; Doherty v. Thornburgh*, 943 F.2d 204 (2nd Cir. 1991); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981); *Martinez et al. v. Greene*, 28 F.Supp.2d 1275 (D. Colo. 1998) [finding the new §236(c)(1) unconstitutional on its face under procedural and substantive due process];*Van Eeton v. Beebe*, 49 F.Supp.2d 1186 (D. Or. 1999); *Cabreja-Rojas v. Reno*, 999 F.Supp. 493 (S.D.N.Y 1998) [Unconstitutional under *Eldridge*

to deny returning lawful permanent residents a hearing before an independent IJ,]; *Ekekhor v. Aljets*, 979 F.Supp. 640 (N.D. Ill. 1997); *St. John v. McElroy*, 917 F.Supp. 243 (S.D.N.Y. 1996); *Montero v. Cobb*, 937 F.Supp. 88 (D. Mass. 1996); *Leader v. Blackman*, 744 F.Supp. 500 (S.D.N.Y. 1990).[15]

The Eleventh Circuit's interpretation of INA §242(b)(9), as precluding review under the writ of habeas corpus of detention decisions directly conflicts with this Court's decisions in *Ex parte Yerger*, 75 U.S. (8 Wall) 332 (1869) and *Felker v. Turpin*, 518 U.S. 651 (1996). In *Yerger* and *Felker* this Court established the principle that the writ of habeas corpus may not be repealed unless Congress explicitly repealed it. This Court would not imply a repeal. In *Yerger*, 75 U.S. at 337 this Court determined that habeas extended to all cases except those "expressly excepted from it." In *Felker*, 518 U.S. at 660, the Court said that the elimination of the writ of habeas corpus could not proceed through "repeal by implication" because such practice is "disfavored."

The court of appeals violated the "clear statement rule" in *Yerger* and *Felker* by first misreading and misapplying INA §242(g) and more recently INA §242(b)(9) after this Court vacated its previous decision. INA §242(b)(9) applies to the "consolidation of questions for judicial review" and does not contain any language precluding habeas review. It conspicuously does not contain the language of INA §242(g) that: "Notwithstanding any other provision of law, no court shall have jurisdiction" to review matters. INA §242(b)(9) is solely for the purpose of consolidating matters that fall within the ambit of INA §242 (that is "final orders"), and is not to review detention and bond decisions which clearly fall within INA §236. The Eleventh Circuit, perhaps recognizing this deficiency looked to the "overall revisions to the judicial review scheme enacted by INA §242 et seq." for its claim that §2241 jurisdiction had been abolished over challenges "to

---

[15] *See generally* Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 Conn. L. Rev. 1411 (1997).

removal orders, removal proceedings, and detention pending removal." *Richardson II*, 180 F.3d 1311, 1315. The Eleventh Circuit's opinion in utilizing some generalized revision of the law to assert the abolition of habeas corpus, however, clearly ran afoul of *Felker* and *Yerger*. These cases require that Congress clearly express its intent to abolish habeas corpus jurisdiction over detention matters.

INA §242(b)(9) fails the *Felker/Yerger* standard in several respects. First, INA §242, generally, by its clear language applies solely to "[j]udicial review of orders of removal" and not to collateral immigration matters such as bond. INA §242(a)(1) states that it applies specifically to "Judicial review of a *final order* of removal . . . " (emphasis added). INA §242(a)(2)(C) provides that "Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal. . . . " (emphasis added). INA §242(b) (which incorporates (b)(9)), states unambiguously in its heading and text that it only applies to review of removal orders. The heading provides only for "Requirements for review of orders of removal." The accompanying text governing all the subsections reads in full: "With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply . . . " (emphasis added). Thus, subsection (b)(9) can only be read as fulfilling certain requirements in regard to the review of final orders of removal, not bond determinations made prior to a final order.

Second, the legislative history of IIRIRA does not support the view that detention decisions are encompassed within INA §242(b)(9). In the discussion of section 306 of IIRIRA concerning judicial review, the legislative history addresses the circumstances for filing "petition[s] for review" regarding "final order[s] of removal." H.R. Conference Report, 104-828, 104th Cong. 2nd Sess. at 219. It does not address questions concerning the review of detention matters.

Third, the term "final order of deportation" is specifically defined by the INA in a manner that demonstrates it only applies to an order entered by a delegate of the Attorney General regarding "whether an alien is deportable, concluding

that the alien is deportable or ordering deportation." INA §101(a)(47).

In contrast, the language of INA §236 refers specifically to detention regarding persons, such as Mr. Richardson, who are in removal proceedings, but without a final order of removal. The whole of INA §236 pertains exclusively to a person arrested and detained "pending a decision on whether the alien is to be removed from the United States." INA §236(a). The title of the section refers specifically to the "[a]pprehension and detention of aliens," and contains its own provision for judicial review at INA §236(e). It does not address removal hearings as does INA §242.[16] The panel acknowledged the existence of INA §236(e) and even reversed itself from its first opinion where it found that INA §236(e) did not apply. *Compare* (App. 48-49 to App. 15 n.10). However, it drew no conclusion from the fact that detention and bond were covered in a statute that was separate from the statute governing the review of final orders of removal except to state that INA §242(b)(9) and INA §236(e) "complement each other." (App. 15 n.10).[17]

---

[16] The contrasting titles found in INA §242 and §236 resolve any ambiguity as to the specific limitation of INA §242 to "removal orders" and INA §236 to review of detention and bond. *Almendarez-Torres v. United States*, 118 S.Ct. 1219, 1226 (1998) [Heading of a section is relevant in determining its meaning]; *I.N.S. v. National Center for Immigrants Rights, Inc.*, 502 U.S. 183 (1991); *Pennsylvania Dept. of Corrections v. Yeskey*, 118 S.Ct. 1952, 1956 (1998) [Title cannot limit plain meaning; its use is to resolve ambiguities].

[17] Congress is presumed not to use any superfluous language in drafting legislation. *Bailey v. United States*, 516 U.S. 137, 145 (1995). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987). Here, Congress expressly provided for detention in INA §236, including a preclusion provision in INA §236(e). It did not discuss or address detention or bond in INA §242 or in the consolidation provision, INA §242(b)(9), that the panel relied upon. Moreover, and notwithstanding the Eleventh

The panel sought to avoid this obvious flaw by conflating removal proceedings with custody determinations in its first opinion (App. 63-64 n.100) and by misstating Mr. Richardson's claim in its second opinion. (App. 12-13) In *Richardson I*, in one footnote, the court of appeals dismissed the central issue in the case that detention and removal proceedings are separate and distinct by simply stating: "We disagree." Characterizing detention issues as "interim orders and actions," it concluded that detention is "inextricably part of the removal proceedings and covered by the broad language of INA §242(g)." (App. 63-64 n.100).[18] In *Richardson II*, it mischaracterized Mr. Richardson's claims as raising "several substantive challenges to his removal proceeding." (App. 12-13). Whatever the current characterization by the Eleventh Circuit, Mr. Richardson challenges solely the constitutionality of depriving lawful permanent residents of their right to a bond hearing merely because of a regulatory characterization that they are seeking entry in violation of the principles established by this Court in *Kwong Hai Chew v. Colding*.[19]

Circuit's finding, detention and removal issues have never been considered part of a final order of removal or even part of the removal hearing. They have always been considered separate and distinct matters from removal proceedings by statute, by regulation, and by court decision. *See supra* at 7-8.

[18] This Court and the lower courts have never treated bond and detention matters in immigration as "inextricably part of the removal proceeding," as the Eleventh Circuit asserted. *See, e.g., Reno v. Flores*, 507 U.S. 292 (1993); *I.N.S. v. National Center for Immigrants Rights*, 502 U.S. 183 (1991); *Jean v. Nelson, supra; Gornicka v. I.N.S.*, 681 F.2d 501, 505-06 (7th Cir. 1982).

[19] For this reason, INA §236(e) does not preclude review because it only precludes the "Attorney General's discretionary judgment" and "any action or decision" by the Attorney General regarding bond, detention, and parole. Mr. Richardson does not challenge any decision or action of the Attorney General herself. He challenges only the constitutionality of the procedure used to determine his bond. Moreover, INA §236(e) is devoid of the "notwithstanding any other provision of law" language that the Eleventh Circuit previously found persuasive in concluding that INA

Absent the clear statement that habeas jurisdiction under §2241 has been "expressly excepted" by statute, it may not be repealed by implication, as the Eleventh Circuit sought to do here.[20]

The Eleventh Circuit's decision is also in conflict with this Court's decision in *Swain v. Pressley*, 430 U.S. 372, 381 (1977). This Court in *Swain* recognized that a collateral remedy or procedure that is inadequate or ineffective to test the legality of a person's detention would constitute a suspension of the Writ of Habeas Corpus which in turn would violate the Suspension Clause of the Constitution. In a footnote, the panel dismissed Mr. Richardson's contention that habeas jurisdiction must exist in the district court or review of his detention would be merely illusory. The panel summarily concluded that there was an effective remedy to review Mr. Richardson's bond claim at the end of the removal process because the appellate court *might* decide the detention question "before any other issues" in the court of appeals when the case arrives. *Richardson II*. (App 16 n.12)

This reasoning, however, ignores both the daily violations of unlawful detention and the lack of any meaningful remedy at the end of the removal hearing. If unlawful executive detention is deferred until after a final order of removal, it will most likely occur after the petitioner has languished in detention for months or years, much like Mr. Richardson. If Mr. Richardson must wait until the end of the removal process to seek review of his detention "pending his removal," as the

---

§242(g) had abolished habeas jurisdiction under §2241 (App. 43; "More importantly, INA §242(g)'s broad admonition that it applies 'notwithstanding *any* other provision of law' sufficiently and clearly encompasses other provisions of law, such as §2241.").

[20] The Eleventh Circuit also claimed that other sections of the INA such as 242(e)(2), 8 U.S.C. §1252(e)(2), 242(b)(2), 8 U.S.C. §1252(b)(2) or the repeal of INA §106(a)(10), 8 U.S.C. §1105a(a)(10) also established the clear repeal of §2241. *Richardson II* (App. 9). However, these sections, like 242(b)(9) fail to contain any express language repealing or restricting the statutory writ of habeas corpus.

panel opinion holds, then he will never have any review of whether he was legally detained "pending removal."

Moreover, deferring review until the end of the removal process would deprive him of any meaningful review because at that point he would have either won his removal challenge and been released, or lost and been deported. Any review at that point is thus rendered meaningless, and the panel's conclusion that this Court *might* review his detention decision immediately before reviewing his final removal order ("[a]lthough not required to do . . . ") is just too tentative and too late to meet *Swain v. Pressley*'s "effective and adequate remedy" requirement. *Swain v. Pressley*, 430 U.S. 372, 381 (1977).

The Eleventh Circuit's ruling is not merely an isolated problem affecting only Mr. Richardson. As of August 1998, the INS was detaining over 1400 aliens in the states of Florida, Georgia, and Alabama. Daily Population Report for August, 1998, INS Eastern Region, Detention and Deportation Division. As these detention statistics were generated prior to the mandatory detention provisions that went into effect in October, 1998, the current number of detainees in INS custody in the Eleventh Circuit is undoubtedly far higher. Moreover, the population in the detention facilities is constantly changing as persons are transferred to other detention centers throughout the United States. Under the Eleventh Circuit's ruling, none of the thousands of people who have been detained since December 22, 1998, have the right to challenge their detention in a meaningful way. They may only challenge it, if at all, at the end of the removal proceeding after they have remained in detention for months or years. Thus, under the Eleventh Circuit's decision, detentions that are premised on completely unlawful grounds such as race or national origin, *see, e.g., Jean v. Nelson*, 472 U.S. 846, 857 (1985) (release decisions must be made "without regard to race or national origin"), or detentions of persons who claim to be United States citizens escape review. Petitioners, like Mr. Richardson, must now wait until the very end of the removal process when such review is illusory. Because of the ruling of the circuit court, thousands of aliens are now

detained without any opportunity to challenge the propriety of such detention. In light of the central and historic concern in our Constitution against unlawful Executive detention that the writ of habeas corpus is designed to remedy, the Eleventh Circuit's ruling raises fundamental and troubling issues which this Court must address.

III. The Eleventh Circuit's Determination Depriving A Lawful Permanent Resident Of The Right To A Bond Hearing Before A Neutral Magistrate Merely Because Of An INS Regulation Characterizing Him As An Arriving Alien Deprives Him Of His Right To Due Process And Directly Conflicts With This Court's Decisions In *Kwong Hai Chew v. Colding* And *Rosenberg v. Fleuti*

As a lawful permanent resident, Mr. Richardson is protected by the Due Process Clause of the Fifth Amendment. *Reno v. Flores*, 507 U.S. 292, 306 (1993); *Accardi v. Shaughnessy*, 347 U.S. 216 (1954); *Bridges v. Wixon*, 326 U.S. 135 (1945). This Court has also recognized that a lawful permanent resident, whether stopped at the border or in the United States, is protected by the Due Process Clause of the Fifth Amendment. *Landon v. Plasencia*, 459 U.S. 21, 32-33, 103 S.Ct. 321, 329-30 (1982). The INS may not by regulation alter the constitutional rights of lawful permanent residents simply because they are at the border rather than in the United States. *Kwong Hai Chew, supra*. Nor may the INS interpret a statute in a manner that would give returning residents less rights than those residents already in the country. *Rosenberg v. Fleuti*, 374 U.S. 449, 83 S.Ct. 1804 (1953).

The Eleventh Circuit decided that it did not have jurisdiction to hear Mr. Richardson's constitutional claim because he could not challenge the procedure used to detain him in a petition for a writ of habeas corpus. Nevertheless, it decided to reach the merits of that issue. In so doing, its decision directly conflicts with this Court's decision in Kwong Hai Chew, by depriving Mr. Richardson of a bond hearing before a neutral magistrate to determine his fitness to be released.

Mr. Richardson, because he is deemed to be an "arriving alien," has been forced to make a "paper record" before the person prosecuting him – the INS district director – so that the director could consider granting a temporary parole. In contrast, a lawful permanent resident stopped inside the United States has the right to go before an immigration judge and seek bond.

In *Kwong Hai Chew*, this Court addressed the procedures that were due a returning resident alien where regulations permitted the exclusion of an arriving alien without a hearing. A resident alien in the United States was, by contrast, accorded a hearing before he could be removed. This Court interpreted the regulation barring a hearing not to apply to *Chew* and reasoned that "[f]or purposes of his constitutional right to due process, we assimilate petitioner's status to that of an alien continuously residing and physically present in the United States." 344 U.S. at 596, 73 S.Ct. at 477. To avoid constitutional problems, this Court construed the regulation as inapplicable and "[a]lthough the holding was one of regulatory interpretation, the rationale was one of constitutional law" and "[a]ny doubts that Chew recognized constitutional rights in the resident alien returning from a brief trip abroad were dispelled by Rosenberg v. Fleuti." *Landon v. Plasencia*, 459 U.S. 21, 33, 103 S.Ct. 321, 329 (1982).

The Court recognized that Mr. Chew, as a returning resident alien, was "entitled as a matter of due process to a hearing on the charges underlying any attempt to exclude him." *Rosenberg*, 374 U.S. at 460, 83 S.Ct. at 1811. (emphasis added). The hearing was required to be "before a tribunal which meets at least currently prevailing standards of impartiality" *Chew*, 344 U.S. 590, 598 n.7, 73 S.Ct. 472, 478 n.7. And although the reasoning in *Kwong Hai Chew* "does not create a right to identical treatment" for returning residents and continuously present residents, *Landon*, 459 U.S. at 30, 103 S.Ct. at 328, this Court understood that any hearing had to be consistent with *Wong Yang Sung v. McGrath*, 339 U.S. 33, 70 S.Ct. 445 (1950), *Kwong Hai Chew*, 344 U.S. 590, 598 n.7, 73 S.Ct. 472, 478 n.7, which required, at a minimum,

the separation of prosecutorial functions from adjudications.[21] The Eleventh Circuit in *Richardson I* disregarded the decision in *Kwong Hai Chew* by finding that due process was satisfied where the person prosecuting Mr. Richardson (the district director) was also the final authority on whether he would receive bond pending the prosecution. By allowing the district director to be both the prosecutor in the removal proceeding and the final arbiter of bond, the Eleventh Circuit ran afoul of this Court's determination in *Kwong Hai Chew* that any procedure for lawful permanent residents who are "arriving aliens" must include a "hearing" that meets "at least current prevailing standards of impartiality."[22]

The Eleventh Circuit distinguished *Kwong Hai Chew,* by addressing the rights that Mr. Richardson had in his removal proceeding, and not the lack of a hearing in his bond proceeding. (App. 74-75 n.114 "In contrast, Mr. Richardson has been afforded extensive procedural safeguards in his removal proceedings."). In essence, it ignored the holding in *Kwong Hai Chew* that prosecutorial and adjudicative functions should be separate to comply with due process, 344 U.S. 590, 598 n.7, 73 S.Ct. 472, 478 n.7, and referred instead to the removal hearing which was not at issue in this case.

In addressing what process was due Mr. Richardson under *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976), the circuit court also disregarded the holdings in *Kwong Chai Chew, Fleuti* and *Landon* when reaching its conclusion that a "paper review" before the district director to determine a resident alien's liberty was sufficient process. In weighing

---

[21] Although *Marcello v. Bonds*, 349 U.S. 302, 311, 75 S.Ct. 757, 762 (1955) rejected the claim that subjecting an immigration judge to the supervision of INS would violate due process *per se*, the present cases raise a different issue. Here, there is not merely supervision. The prosecutor and decision maker on bond are one and the same.

[22] Under long standing practice and administrative law, an alien generally "should not be detained or required to post bond except on a finding that he is a threat to the national security . . . or that he is a poor bail risk." *Matter of Patel,* 15 I&N Dec. 666 (1976).

Mr. Richardson's liberty interest, the Eleventh Circuit determined that Mr. Richardson's constitutional rights were "slightly attenuated given his resident alien status." (A.77). This holding is in sharp contrast to this Court's decisions in *Kwong Chai Chew,* as well as *Fleuti* and *Landon* all of which recognize no "attenuation" of a lawful permanent resident's constitutional rights when he is arriving in the United States. As the *Mathews* test is a balancing test, the Eleventh Circuit's conclusion regarding a resident alien's "attenuated rights" affects the outcome of that analysis.[23]

The Eleventh Circuit's *Mathews* analysis also ignored several other important facts. The paper request before the district director was not a request for bail or bond, but solely for parole. A parole request is made to the prosecuting officer – the district director – and is only a letter request without formal procedures. There is no review before a neutral party where witnesses may be presented and evidence taken, and the burden is on the alien to show that he deserves parole. The Eleventh Circuit's risk analysis was also seriously flawed. Its determination that the risk of erroneous deprivation was low, because "counsel was able to make written bond and parole requests" is contrary to the requirements of procedural due process. This Court has said that procedural due process

---

[23] In light of this Court's ruling that there is no doubt that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana,* 504 U.S. 71, 80 (1992) the Eleventh Circuit's attenuation claim seems peculiar. This Court has repeatedly recognized the "importance and fundamental nature" of liberty from bodily restraint and that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno,* 481 U.S. 739, 755 (1987). The Eleventh Circuit's determination that the risk of error was low in requesting bond from the prosecutor, ignores the institutional pressure on the INS to keep aliens with criminal records detained, *see e.g., Ekekhor v. Aljets,* 979 F.Supp. 640, 644 (N.D.Ill. 1997) and *St. John v. McElroy,* 917 F.Supp. 243, 250 (S.D.N.Y. 1996). It also ignores the perfunctory treatment that Mr. Richardson's bond request received prior to the initiation of litigation in this case. (App. 171, 174).

requires more extensive procedures in circumstances where the interests at stake were not as serious as incarceration. *See, e.g., Fuentes v. Shevin*, 407 U.S. 67 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970). The Eleventh Circuit also misconstrued the issue concerning the administrative burden on the Department of Justice in maintaining bond hearings. It determined that the paper parole request was adequate by conflating, once again, matters concerning detention and removal. The panel found that the INS bond and parole procedures "must be evaluated in light of the many procedural safeguards in the overall removal proceedings." (App. 77-78). But those procedural safeguards do not address bond in any fashion because bond proceedings are "separate and apart" from removal proceedings. 8 C.F.R. §3.19(d). It also erroneously conflated "the volume of arriving aliens," which include those seeking admission for the first time, with resident aliens such as Mr. Richardson, in claiming that immigration judge hearings would overburden the system. And it ignored the fact that, traditionally, bond hearings were routinely given to returning lawful permanent residents without additional burdens to the immigration system.[24]

---

[24] Any resort that respondents may make to such cases as *Reno v. Flores*, 507 U.S. 292 (1993) or *Carlson v. Landon*, 342 U.S. 524 (1952) is of no avail. *Flores* recognized the fundamental liberty interest in freedom from physical restraint, 507 U.S. at 302, but found that because juveniles were "always in some form of custody," 507 U.S. at 302-03, they did not have a fundamental right to liberty that required a narrowly tailored compelling state interest as in *Salerno*. *Id.* Similarly, *Carlson*, supports Mr. Richardson's position that a habeas corpus action is permissible to challenge detention. Moreover, this Court in *Carlson* recognized that the Attorney General's discretion to detain without bond was rarely exercised. *Carlson*, 342 U.S. at 538 n.31 ("It is quite clear . . . that detention without bond has been the exception) and at 542 ("[A] report filed with this Court by the Department of Justice in this case at our request shows allowance of bail in the large majority of cases"). And the constitutionality of the statute was premised on the recognition that the Attorney General's discretion is subject to judicial review and can be overturned upon "a showing of clear

The Eleventh Circuit's ruling is also in direct conflict with *Rosenberg v. Fleuti*. This Court in *Fleuti* created a judicial exception to the statutory definition of entry and held that a lawful permanent resident alien who leaves the United States for a "brief, casual and innocent departure" and does not "meaningfully interrupt" his resident status is not deemed upon his return to make a new "entry" into the United States for immigration purposes. This Court held that the entry statutes should not be "woodenly construed" because so much was at stake for the permanent resident. *Fleuti*, 374 U.S. at 460, 83 S.Ct. at 1811. On the record in this case, Mr. Richardson's trip was clearly "brief, casual and innocent" and did not "meaningfully interrupt" his status. If they had not treated his trip abroad as a new admission, he would be entitled to a bond hearing before an immigration judge. 8 C.F.R. §3.19(a).

CONCLUSION

For the reasons stated above, this Court should issue a writ of certiorari to the Eleventh Circuit, reverse the Circuit's holdings that jurisdiction under 28 U.S.C. §2241 has been repealed and order this case remanded to the district court to issue a writ of habeas corpus for Mr. Richardson's immediate release from confinement.

Respectfully submitted,

IRA J. KURZBAN
HELENA M. TETZELI
KURZBAN, KURZBAN, WEINGER
& TETZELI, P.A.

---

abuse." *Id.* at 540. In fact, this Court recognized that "the Attorney General is not left with untrammeled discretion as to bail. Courts review his determination. Hearings are had, and he must justify his refusal of bail." *Id.* at 543.

Ralph RICHARDSON, Plaintiff-Appellee,

v.

Janet RENO, Attorney General of the United States; Doris Meissner, Commission, Immigration and Naturalization Service; Robert Wallis, Acting District Director, Immigration and Naturalization Service; United States Immigration and Naturalization Service; United States Department of Justice; and Executive Office of Immigration Review, Defendants-Appellants.

No. 98-4230.

United States Court of Appeals,
Eleventh Circuit.

July 14, 1999.

Thomas E. Scott, U.S. Attorney, Adalberto Jordan, Miami, FL, David J. Kline, Deputy Director, Ernesto H. Molina, Jr., David V. Bernal, Office of Immigration Litigation, U.S. Dept. of Justice, Washington, DC, for Defendants-Appellants.

Helena Marie Tetzeli, Ira Kurzban, Kurzban, Kurzban, Weinger & Tetzeli, PA, Miami, FL, for Plaintiff-Appellee.

Appeal from the United States District Court for the Southern District of Florida.

ON REMAND FROM THE UNITED STATES SUPREME COURT.

Before CARNES and HULL, Circuit Judges, and HENDERSON, Senior Circuit Judge.*.

HULL, Circuit Judge:

This case is before us on remand from the Supreme Court.[1] On June 1, 1999, the Court granted *certiorari* in this case, vacated our judgment, and remanded the case for further consideration in light of *Reno v. American-Arab Anti-Discrimination Committee*, ___ U.S. ___, 119 S.Ct. 936, 142 L.Ed.2d 940, *pet. for reh'g denied*, ___ U.S. ___, 119 S.Ct. 1498, 143 L.Ed.2d 652 (1999). *Richardson v. Reno*, ___ U.S. ___, 119 S.Ct. 2016, ___ L.Ed.2d ___ (1999).

I. PROCEDURAL UPDATE

After we issued *Richardson v. Reno*, 162 F.3d 1338 (11th Cir.1998) ("*Richardson I*"), the Supreme Court decided *American-Arab*. Following *American-Arab*, Richardson asked us to recall our mandate. On May 4, 1999, citing *Calderon v. Thompson*, 523 U.S. 538, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998), we noted that the Supreme Court has restricted the circumstances under which a court of appeals can recall its own mandate. However, recognizing the effect of *American-Arab* on our opinion in *Richardson*, we noted in a published order dated May 4, 1999, that "we would welcome . . . an opportunity to revisit our decision in *Richardson v. Reno*, 162 F.3d 1338 (11th Cir.1998), in light of the Supreme Court's decision in"

---

* This decision is rendered by a quorum, due to Judge Henderson's death on May 11, 1999. 28 U.S.C. § 46(d).

[1] We commend counsel for all parties for the excellent briefs filed promptly on remand.

American-Arab. Richardson v. Reno, 175 F.3d 898 (11th Cir.1999).

On June 1, 1999, the Supreme Court granted *certiorari* in this case, vacated our judgment, and remanded the case for further consideration in light of *American-Arab. Richardson v. Reno*, ___ U.S. ___, 119 S.Ct. 2016, ___ L.Ed.2d ___ (1999). After review, we reaffirm the holding in *Richardson I* that IIRIRA's amendments to the INA preclude § 2241 habeas jurisdiction over Richardson's petition challenging his removal proceedings, which commenced after IIRIRA's effective date and his denial of bond and parole by the INS District Director without an individualized hearing before the immigration judge. In support of this holding, we readopt and reaffirm the reasoning in *Richardson I* except to the extent it relied on INA § 242(g) to support its holding. As discussed below, we find that IIRIRA's amendments to the INA, independently of § 242(g), channel judicial review of the INS' detention of Richardson and other issues in his removal proceedings exclusively into the judicial review provided under the INA. *See American-Arab*, ___ U.S. at ___, 119 S.Ct. at 943.

II. DISCUSSION

In *Richardson I*, we held that IIRIRA repeals district-court jurisdiction to issue writs of habeas corpus under § 2241 to aliens challenging their removal from the United States or their detention while awaiting removal.

162 F.3d at 1378-79.[2] In reaching this conclusion, we emphasized INA § 242(g), which provides that,

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

8 U.S.C. § 1252(g) (Supp.1998). We reasoned in *Richardson I* that this "sweeping language" illustrated congressional intent to consolidate the judicial review of removal proceedings into the INA's judicial-review scheme, and that INA § 242(g) "expressly repeals any and all jurisdiction except that conferred by INA § 242" including § 2241 habeas jurisdiction. 162 F.3d 1358-59.

---

[2] At the outset, we note that *Richardson* remains one of the few circuit court decisions where only post-IIRIRA law, as opposed to the transition rules, applies. This is so because Richardson's removal proceedings began in October 1997 after IIRIRA's effective date. Most of the circuit decisions addressing the issue whether IIRIRA's amendments to the INA repeal § 2241 jurisdiction over deportation or exclusion proceedings involve immigration proceedings initiated before IIRIRA, and thus only IIRIRA's transitional provisions apply, and they do not involve the full, and extensive, revisions to the INA's judicial review scheme enacted by INA § 242. *See, e.g. Mayers v. INS*, 175 F.3d 1289 (11th Cir.1999); *Mustata v. United States Dept. of Justice*, 179 F.3d 1017 (6th Cir.1999); *Sandoval v. Reno*, 166 F.3d 225, 228 (3d Cir.1999); *Goncalves v. Reno*, 144 F.3d 110, 122 (1st Cir.1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 1140, 143 L.Ed.2d 208 (1999); *Henderson v. INS*, 157 F.3d 106, 109 (2d Cir.1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 1141, 143 L.Ed.2d 209 (1999); *Jean-Baptiste v. Reno*, 144 F.3d 212, 219-20 (2d Cir.1998).

The Supreme Court's decision in *American-Arab* holds that INA § 242(g) does not apply to the "universe of deportation [or removal] claims." 119 S.Ct. 943. The Court in *American-Arab* narrowly construed INA § 242(g) as applying only to these three discrete actions described in INA § 242(g): the "decision or action" to (1) "commence proceedings," (2) "adjudicate cases," or (3) "execute removal orders." ___ U.S. at ___, 119 S.Ct. at 943. Richardson's § 2241 petition does not involve any of these three discrete actions. Therefore, in light of *American-Arab*, we find that INA § 242(g) does not apply in this case.

Importantly, however, our holding in *Richardson I* did not rest exclusively on INA § 242(g). Instead, we concluded that the extensive revisions to the judicial review of removal proceedings enacted by IIRIRA and the AEDPA, viewed together, repealed § 2241 jurisdiction over petitions challenging removal proceedings. In particular, we relied on the overall judicial review scheme enacted in INA § 242(b). We did cite INA § 242(g) as an expression of congressional intent to streamline and consolidate the judicial review of immigration matters. However, in addition to INA § 242(g), we relied on such provisions as the AEDPA's repeal of habeas under former INA § 106(a)(10) and the express provision for limited habeas jurisdiction created by INA § 242(e)(2). *Richardson*, 162 F.3d at 1358 ("[T]he elimination of INA § 106(a)(10)'s habeas corpus review by the AEDPA further evidences congressional intent to preclude statutory habeas corpus review over immigration decisions."); *Id.* at 1357 (noting that "INA § 242(e)(2) provides for statutory habeas review under the INA in this narrowly limited situation.

This evidences Congress' ability to create statutory habeas review under the INA when it so desires."). Furthermore, we noted that "INA § 242(b)(2) provides that the venue for judicial review is only in the court of appeals." *Id.* at 1354.

More specifically, in *Richardson,* we also relied on INA § 242(b)(9) in support of our conclusion. We noted that INA § 242(b)(9) consolidates the time and manner of judicial review of "all questions of law and fact" in removal proceedings:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this chapter shall be available only in judicial review of a final order under this section.

Richardson, 162 F.3d at 1354 (quoting 8 U.S.C. § 1252(b)(9) (Supp.1998)). INA § 242(b)(9) instructs that "all questions of law and fact" includes all "interpretations and application of constitutional and statutory provisions." *Id.* In *Richardson I,* we also recognized that INA § 242(b)(9) provides clear evidence of Congress' desire to "abbreviat[e] judicial review to one place and one time: only in the court of appeals and only after a final removal order and exhaustion of all administrative remedies." 162 F.3d at 1354; *see also* 162 F.3d at 1373 ("In addition to retaining a mandatory exhaustion provision, IIRIRA added INA § 242(b)(9) which now expressly provides that judicial

review is available of only 'a final order.' ").[3] In *Richardson I*, we also reasoned that INA § 242(b)(9), and not just INA § 242(g), clarified the restriction on the judicial review of immigration decisions:

> INA § 242(g), along with INA § 242(b)(9), should be properly understood not as an attempt to divest the courts of jurisdiction they previously possessed, but as Congress' effort to make absolutely clear what should have been apparent under the INA and AEDPA all along: that review of INS' conduct of deportation proceedings is available only after the entry of a final order of deportation, and only under the INA provisions specifically provided for that purpose.

162 F.3d at 1358.

Similarly, the Supreme Court in *American-Arab*, albeit in dicta, described the text of § 242(b)(9) as a "general jurisdictional limitation."

> We are aware of no other instance in the United States Code in which language such as this [§ 242(g)] has been used to impose a general jurisdictional limitation; and that those who enacted IIRIRA were familiar with the normal manner of imposing such a limitation is demonstrated by the text of § 1252(b)(9) [INA

---

[3] INA § 242(d)(1) mandates exhaustion and states:

> (d) REVIEW OF FINAL ORDERS. – A court may review a final order of removal only if –
>
> (1) the alien has exhausted all administrative remedies available to the alien as of right, . . .

8 U.S.C. § 1252(d).

> § 242(b)(9)], which stands in stark contrast to § 1252(g) [INA § 242(g)].

___ U.S. at ___, 119 S.Ct. at 943. The Court then characterized INA § 242(b)(9) as an "unmistakable 'zipper clause' " that "channels judicial review" of INS "decisions and actions" exclusively into the judicial review provided under the INA. *Id.*

The Supreme Court defined the effect of the "zipper clause:" "[I]t is a sort of 'zipper' clause that says 'no judicial review in deportation cases unless this section provides judicial review.' " *Id.* at 943. As the Supreme Court stated, INA § 242 was intended to assure that issues of law and fact are not subject to "separate rounds of litigation." *Id.* at 944.

Thus, after review of *American-Arab* and the parties' supplemental briefs on remand, we reaffirm our holding that IIRIRA precludes § 2241 habeas jurisdiction over an alien's petition challenging his removal proceedings and detention pending removal proceedings. Judicial review of the issues raised in Richardson's § 2241 petition must await a final BIA removal order and can occur in the court of appeals through a petition to review that final order. We reach this conclusion for reasons similar to those outlined in *Richardson I* except that we rely on INA § 242(b)(9), rather than INA § 242(g), as the expression of congressional intent to preclude § 2241 jurisdiction in this situation. Thus, we find that the "unmistakable zipper clause" of INA § 242(b)(9), along with the overall revisions to the judicial review scheme enacted by INA § 242 *et seq.*, constitute a sufficiently broad and general limitation on federal jurisdiction to preclude § 2241 jurisdiction

over challenges to removal orders, removal proceedings, and detention pending removal. *See American-Arab*, ___ U.S. at ___, 119 S.Ct. at 943; *Richardson I*, 162 F.3d at 1358 (reasoning that a broad jurisdictional limitation can satisfy the requirements of *Felker v. Turpin*, 518 U.S. 651, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996)).

Furthermore, for all the reasons discussed in *Richardson I*, we conclude that IIRIRA's limitation on § 2241 habeas jurisdiction is not unconstitutional on its face or as applied to Richardson in this case. *Richardson*, 162 F.3d at 1378-79 ("This repeal also does not violate the Suspension Clause. INA § 242(a)(2)(C) does not remove all judicial review. At a minimum, judicial review remains available to Richardson under INA § 242(a)(2)(C) to determine if the specific conditions exist that bar jurisdiction in the court of appeals. If the bar applies, jurisdiction remains to consider whether the level of judicial review remaining in INA § 242(a)(2)(C) in a particular case satisfies the Suspension Clause. If not, Richardson can pursue adequate and effective judicial review of statutory and constitutional issues under INA §§ 242(b)(2) and 242(b)(9).").[4]

---

[4] Developments in Richardson's ongoing removal proceedings that occurred after *Richardson I* illustrate why Congress in IIRIRA precluded this collateral § 2241 proceeding and channeled judicial review exclusively to the review provided under the INA and why courts should not intervene until the administrative process is completed. Concurrent with this proceeding, Richardson appealed the immigration judge's removal order to the BIA and on May 5, 1999, the BIA sustained certain findings of the immigration judge but remanded Richardson's case for further proceedings regarding the nature of Richardson's state criminal conviction, whether it constituted

Our earlier conclusion in *Richardson I* – that IIRIRA's limitation on § 2241 jurisdiction is constitutional – is fortified by this Court's subsequent decision in *Lettman v. Reno*, 168 F.3d 463, 465-66 (11th Cir.1999). Citing with approval cases that we relied on in our original opinion in *Richardson I*, this Court, in *Lettman*, held that when the government invokes IIRIRA § 309(c)(4)(G), which limits judicial-review very much like INA § 242(a)(2)(C), this Court exercises jurisdiction to determine whether the alien is actually deportable. *Lettman*, 168 F.3d at 465 (citing with approval *Yang v. INS*, 109 F.3d 1185 (7th Cir.1997), and *Okoro v. INS*, 125 F.3d 920 (5th Cir.1997)). Thus, *Lettman* establishes that, even when an alien faces a putative bar to judicial review like IIRIRA § 309(c)(4)(G), the alien still receives substantial judicial review. *Lettman's* holding is consistent with and buttresses our observation in *Richardson I* that if the government invokes INA § 242(a)(2)(C), this Court will determine whether Richardson is actually an alien, is deportable, and deportable for a reason covered by INA § 242(a)(2)(C). *Richardson*, 162 F.3d at 1376 ("Thus, we find that the INA still assures Richardson a significant degree of judicial review in the court of appeals after a final removal order, despite INA § 242(a)(2)(C). . . . Any constitutional infirmities Richardson perceives in that INA-proscribed judicial review must be raised in an attack on the constitutionality of INA § 242(a)(2)(C) only in the court of appeals and only

---

an aggravated felony, and its effect on Richardson's immigration status. These developments also exemplify that the exhaustion of remedies requirement is an appropriate method of conserving judicial resources and permitting the agency to correct any mistakes along the way.

after a final removal order.").[5] Indeed, the fact that in *Lettman* this Court extensively analyzed the statute invoked by the INS in charging the alien with deportability, concluded that the alien was not deportable, and vacated the alien's deportation order, illustrates the extent, and effectiveness, of the judicial review available even when the government invokes INA § 242(a)(2)(C) or IIRIRA § 309(c)(4)(G).

The constitutional adequacy of the judicial review available when INA § 242(a)(2)(C) applies will not be decided unless or until Richardson attempts to pursue a petition for judicial review under INA § 242(b). However, at this interim stage, Richardson clearly has not shown that he is unable to secure full adequate and effective judicial review, especially in light of the judicial review recognized by this Court in *Lettman*.[6]

---

[5] Additionally, we note that INA § 242(a)(2)(C) deals with operational decisions by the INS and does not foreclose constitutional challenges to the statute itself or other substantial constitutional issues from being raised in the court of appeals. Such challenges might include any potential constitutional issues regarding Richardson's detention pending his removal proceedings. *See Webster v. Doe*, 486 U.S. 592, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988); *LaGuerre v. Reno*, 164 F.3d 1035, 1041 (7th Cir.1998).

[6] We recognize that this Court recently held that the AEDPA's repeal of habeas under former INA § 106(a)(10), as amended by IIRIRA § 309(c)(4)(G), did not repeal § 2241 jurisdiction over challenges to deportation proceedings. *Mayers v. INS*, 175 F.3d 1289, 1298 (11th Cir.1999). However, *Mayers* was decided under IIRIRA's transitional rules. *Id.* at 1293. Therefore, most of IIRIRA's revisions to the INA, particularly INA § 242(b)(9), did not apply in *Mayers*. Indeed, this Court in *Mayers* emphatically noted several times that the holding in

Lastly, we address Richardson's contention that § 2241 jurisdiction remains to challenge his detention, even if post-IIRIRA he can seek judicial review of the other issues in his removal proceedings only under the INA.[7] Richardson's § 2241 petition raised several

---

Mayers did not conflict with *Richardson I* because IIRIRA's permanent provisions applied in *Richardson I*. *Id.* at 1297.

This Court in *Mayers* further stressed that the aliens facing deportation in *Mayers* were subject to a final deportation order, whereas Richardson is challenging his detention while his removal proceedings remain pending. Before seeking habeas relief, the aliens in *Mayers* had exhausted all available administrative remedies and had sought, but been denied, all judicial review in the court of appeals in a two-sentence unpublished order issued prior to this Court's decision in *Lettman v. Reno*, 168 F.3d 463 (11th Cir.1999). Thus, three elements were crucial in *Mayers*: (1) the aliens were subject to a final deportation order after BIA review; (2) the aliens first had filed a petition for judicial review under the INA in the court of appeals *before* filing a § 2241 petition; and (3) the aliens had been unable to obtain any judicial review whatsoever in the court of appeals. Additionally, while the criminal aliens in *Mayers* had been unable to obtain any judicial review in the court of appeals, it is now clear in this Circuit that criminal aliens, post-*Lettman*, will be able to obtain judicial review of whether they are aliens and deportable. For these reasons, the holding in *Mayers* does not affect our holding in this case; indeed, *Mayers* actually illustrates why the appropriate avenue for judicial review here lies not under § 2241 but in the review provided under the INA.

[7] Richardson stresses that his detention has lasted twenty months. However, the time that Richardson was detained before his plenary removal hearing before the immigration judge was only two and one-half months. Richardson was arrested on October 26, 1997; the INS initiated removal proceedings against him on October 26, 1997, and the immigration judge conducted the plenary removal hearing and issued a removal order on

substantive challenges to his removal proceedings, such as whether the INS properly considered him as an "arriving alien." According to Richardson, even if INA § 242 precludes § 2241 jurisdiction over those issues, INA § 242 does not apply to the INS' detention decisions in his case because detention always has been considered a separate and distinct matter from a removal proceeding. Richardson concedes that his § 2241 petition does not seek review of the INS District Director's discretionary decision regarding bond or parole.[8] Instead, the detention and parole issues in Richardson's § 2241 petition involve mainly whether the INS properly detained Richardson as an "arriving alien" and whether the denial of bond and parole by the INS District Director, without a subsequent individualized hearing before an immigration judge, violated Richardson's constitutional rights.[9]

January 8, 1998. Moreover, Richardson's detention is not entirely beyond his control; he is detained only because of the removal proceedings, and he may obtain his release any time he chooses by withdrawing his application for admission and leaving the United States.

[8] As outlined in detail in *Richardson I*, Richardson's attorney initially requested bond and parole for Richardson by filing affidavits and supporting information with the INS District Director. After review, the District Director denied the bond request finding that Richardson would have no incentive to appear for immigration hearings. The District Director also denied parole on the basis that Richardson had not established a significant public benefit or urgent humanitarian reasons. *See Richardson I* at 1349.

[9] On appeal, Richardson also asserts that the mandatory detention rules in INA § 236(c)(1) are unconstitutional. Those rules did not become effective until October 1998 during the pendency of this appeal, and thus Richardson necessarily has

We find that Richardson's statutory and constitutional claims regarding his detention are clearly

---

been unable to amend his § 2241 petition to include those claims. More importantly, there is no *evidence* in this record to date that the INS has sought to apply those mandatory detention rules retroactively to Richardson. A question arises whether the INS would need to apply those rules to Richardson who already is being detained, has had an opportunity to seek bond and parole, and was denied both bond and parole. Indeed, Richardson does not contend that the INS District Director abused his discretion in denying him bond and parole, but only that Richardson should not be considered an "arriving alien" and should have received a subsequent hearing before an immigration judge.

If the INS subsequently did seek to apply the mandatory detention rules to him, Richardson argues strenuously that INA § 236(c)(1) does not apply to him because it applies only to persons released to the INS before completion of their criminal sentence and not to aliens, like Richardson, who completed their criminal sentence many years before. In short, at this juncture, we find that the statutory issue of whether the mandatory detention rules apply to Richardson and, if so, the issue of whether the mandatory detention rules are constitutional are not properly before this Court. Thus, we need not decide whether jurisdiction exists over any claims regarding the mandatory detention rules in § 236(c)(1). We do note that the only circuit to address the issue has upheld the constitutionality of the mandatory detention rules in INA § 236(c)(1). *Parra v. Perryman*, 172 F.3d 954 (7th Cir.1999); *see also Richardson I*, 162 F.3d at 1358 n. 100. The Seventh Circuit made this observation in the context of a § 2241 petition, but the INS in *Parra* did not raise INA § 242(b)(9) to support its position that the district court lacked jurisdiction. 172 F.3d at 957. In addition, the Seventh Circuit in *Parra* did not discuss the effect of INA § 242(b)(9) on the district court's § 2241 jurisdiction. *Compare LaGuerre v. Reno*, 164 F.3d 1035, 1040 (7th Cir.1998) (holding that district-court jurisdiction "did not survive the enactment" of the AEDPA).

encompassed within INA § 242(b)(9).[10] That provision is not limited to any particular form of proceeding; rather it applies to "any action taken or proceeding brought to remove an alien." 8 U.S.C. § 242(b)(9).[11] "Any action

---

[10] Richardson argues that INA § 236(e) is the sole post-IIRIRA INA provision applicable to judicial review of his detention and that INA § 242 does not apply at all in this case. However, we find that both INA §§ 236(e) and 242 apply to INS detention decisions in Richardson's ongoing removal proceedings. The two sections are not inconsistent but complement each other. Section 242 channels judicial review to the court of appeals under the INA, and within that judicial review § 236(c) prescribes that discretionary bond decisions are not reviewable.

The INS argues that even though Richardson does not contend the INS District Director abused his discretion in denying him bond, Richardson's claim that the Attorney General impermissibly delegated bond decisions for "arriving aliens" to the District Director and not an immigration judge constitutes a challenge to a discretionary decision of the Attorney General not subject to judicial review under § 236(e). Since we hold that there is no subject matter jurisdiction over Richardson's § 2241 petition as a result of INA § 242, *et seq.*, and particularly § 242(b)(9), we do not address this § 236(e) issue but note that the scope of the judicial review bar in § 236(e), similar to the judicial review limitations in § 242(a)(2)(C), are matters to be addressed only in a petition for judicial review in the court of appeals and only after a final removal order.

[11] By contrast, former INA § 106(a) was limited to final orders based on proceedings under former 8 U.S.C. § 1252(b) (1994). 8 U.S.C. § 1105a(a) (1994). Under that scheme, "final orders" included "all matters on which the validity of the final order is contingent, rather than only those determinations actually made at the hearing." *INS v. Chadha*, 462 U.S. 919, 938, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). Detention determinations, on which deportation proceedings were not contingent, fell outside of "final orders of deportation" and were held under

taken" in INA § 242(b)(9) encompasses detention as the first step in the removal process. 8 U.S.C. § 1252(b)(9). Indeed, the Supreme Court previously has found that detention is "necessary to give effect to the provisions for the exclusion or expulsion of aliens. . . . " *Wong Wing v. United States*, 163 U.S. 228, 235, 16 S.Ct. 977, 41 L.Ed. 140 (1896); *see Carlson v. Landon*, 342 U.S. 524, 538, 72 S.Ct. 525, 96 L.Ed. 547 (1952). The relationship of detention to removal proceedings is underscored by congressional findings that criminal aliens, with great regularity, fail to show for their immigration proceedings. *See e.g.*, S.Rep. No. 104-48 (Apr. 7, 1995). Thus, the plain language of INA § 242(b)(9) applies to detention proceedings insofar as they arise from the removal proceedings. Accordingly, Richardson's careful attempt to cast his § 2241 petition as a challenge to detention while alleging that he is not in fact removable on the charged grounds does not take that challenge outside of the scope of INA § 242(b)(9).[12]

INA § 242(a), not INA § 242(b). *Cheng Fan Kwok v. INS*, 392 U.S. 206, 88 S.Ct. 1970, 20 L.Ed.2d 1037 (1968). New INA § 242, however, omits any limitation to a particular form of proceeding. 8 U.S.C. § 1252(a).

[12] Richardson also stresses that § 2241 jurisdiction must exist over bond claims or otherwise they will be always mooted. That is not so. If Richardson becomes subject to a final BIA removal order and then files a petition for judicial review in this Court, he will remain detained until he is actually removed from the United States. Thus, Richardson will be detained during his petition for judicial review in this Court and any subsequent review by the Supreme Court, and his bond claim will not be mooted. There is no reason why a bond claim cannot or will not be decided before any other issues in the case. Although not required to do so, a court of appeals could address any bond issue early in the appeal before the issues relating to the removal order itself are decided or even briefed.

Accordingly, we reaffirm and reinstate our opinion in *Richardson I* except for the aspects of the opinion that relied on INA § 242(g). We REVERSE the decision of the district court, VACATE the stay of Richardson's removal order, and direct the district court to dismiss Richardson's § 2241 petition for lack of subject matter jurisdiction.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-4230

D.C. Docket No. 97-3799-CIV-DAVIS

RALPH RICHARDSON,

Petitioner-Appellee,

versus

JANET RENO, Attorney General of the United States; DORIS MEISSNER, Commission, Immigration and Naturalization Service; ROBERT WALLIS, Acting District Director, Immigration and Naturalization Service; UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE; UNITED STATES DEPARTMENT OF JUSTICE; and EXECUTIVE OFFICE OF IMMIGRATION REVIEW,

Respondents-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(Filed December 22, 1998)

Before CARNES and HULL, Circuit Judges, and HENDERSON, Senior Circuit Judge.

HULL, Circuit Judge:

The Court VACATES and WITHDRAWS the previous opinion dated December 9, 1998 and substitutes the following opinion. While the remainder of the opinion stays the same, the Court has revised footnotes 88, 137, and the third paragraph in Section IV(H) and added the following subsequent history to the citations of *Hose v. INS*, 141 F.3d 932 (9th Cir.1998): *withdrawn and reh'g en banc granted*, ___ F.3d ___, No. 97-15789 (9th Cir. December 2, 1998). Although the Ninth Circuit's order granting the rehearing en banc was dated December 2, 1998, the order did not appear in the on-line subsequent history of *Hose* until December 10, 1998 – the date after the Court published its original decision in this case.

TABLE OF CONTENTS

I. FACTS AND PROCEDURAL HISTORY 3

II. RICHARDSON'S HABEAS CORPUS PETITION .. 8

III. NEW IMMIGRATION LAWS 11

A. "Removal" Proceedings 12

B. Permanent Resident Criminal Aliens Returning From Abroad 14

C. Supreme Court's *Fleuti* Doctrine 16

D. Detention of Criminal Aliens "Seeking Admission" 19

E. Detention Under TPCRs in IIRIRA § 303(b)(3) 22

F. Detention Under INA § 236(c) 26

G. INA § 236(e) Restricts Review of Bond and Parole Decisions 29

H. Procedures for Removal Hearings 31

I. IIRIRA Consolidates Judicial Review in the Court of Appeals 32

J. INA § 242(a)(2)(C) Restricts Review of Removal Orders Against Criminal Aliens 36

K. INA § 242(a)(2)(B)(ii) Restricts Review of Discretionary Decisions 38

IV. DISCUSSION 38

A. INA § 242(g) Precludes § 2241 Habeas Jurisdiction Over Immigration Decisions 39

B. No Constitutional Infirmities to Avoid 47

C. Eleventh Circuit's *Boston-Bollers* Decision 51

D. Due Process Clause 55

E. Article III 60

F. Suspension Clause 61

G. Second Circuit's *Henderson* Decision 66

H. Ninth Circuit's *Magana-Pizano* Decision 69

I. Seventh Circuit's *Yang* Decision 72

J. INA §§ 242(b)(9) and (d) Require Final Removal Order 83

K. Alternative Review Under INA Satisfies Suspension Clause 87

V. CONCLUSION 96

This appeal arises from a district court's order granting a writ of habeas corpus to a thirty-year permanent

resident alien petitioner with a cocaine-trafficking conviction who was detained as he attempted to enter the United States after a two-day trip to Haiti. The INS district director denied bond pending the outcome of petitioner's removal proceedings. Petitioner filed his habeas corpus petition under 28 U.S.C. § 2241 asserting that the INS' illegal detention, denial of admission, and denial of a bond hearing violated his constitutional and statutory rights as a lawful permanent resident alien.

This case presents issues of first impression in this Circuit regarding subject matter jurisdiction under the Immigration and Nationality Act ("INA"), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). After review, we find the district court lacked jurisdiction over the habeas corpus petition. We reverse and order the district court to dismiss the petition.

I. FACTS AND PROCEDURAL HISTORY

Appellee-petitioner Ralph Richardson ("Richardson") is a native and citizen of Haiti who has been a lawful permanent resident alien in the United States since 1968. In 1984, Richardson was convicted of carrying a concealed weapon. In 1990, Richardson was convicted of trafficking cocaine and served five years in prison.[1] The

---

[1] Richardson initially served only three years of his five-year sentence on the drug-trafficking offense. In 1993, he was arrested for violating his probation by eluding police and served the remainder of his sentence in prison. He was released from prison on January 11, 1994.

parties do not dispute that Richardson could have been deported under the immigration laws in existence in 1990 and could be deported under current immigration law but that deportation proceedings were never initiated.[2]

On October 24, 1997, Richardson left the United States and traveled to Haiti. On October 26, 1997, Richardson attempted to re-enter the United States at the Miami International Airport, but was not allowed to enter. At the initial immigration checkpoint, Richardson presented an expired "I-151" card, also called an Alien Resident Card, and a valid Haitian passport. Richardson's use of an expired card caused him to be referred to a secondary immigration inspector for a more detailed interview regarding his eligibility to enter the United States.

Through this inspection, the INS concluded that Richardson, although a lawful permanent resident alien, was no longer eligible to enter the United States under the new immigration laws due to his prior criminal convictions. During the inspection, Richardson admitted his criminal history including his cocaine-trafficking conviction, an aggravated felony under INA § 103(a)(43).[3] Richardson was taken to the Krome Detention Center, Miami,

---

[2] 8 U.S.C. § 1251(a)(1) (1990); 8 U.S.C. § 1182(a)(10) (1990); 8 U.S.C. § 1227(a)(2)(b)(i) (Supp. 1998).

[3] 8 U.S.C. § 1101(a)(43) (Supp. 1998). This opinion utilizes the section numbers of the INA and IIRIRA because the text of those statutes references INA and IIRIRA sections and because certain parts of IIRIRA are not codified. *See* footnote 42 *infra*. At the Miami International Airport, the immigration inspector prepared a four-page sworn statement signed by Richardson that outlined his criminal history.

Florida, and immediately was placed in "removal" proceedings under INA § 240.[4]

On November 13, 1997, Richardson's attorney sent a letter to the INS district director in Miami requesting release from custody. On December 4, 1997, the district director denied Richardson's request.

On November 18, 1997, while awaiting the district director's response, Richardson also sought release on bond with the immigration judge at Krome. New INA § 101(a)(13)(C)(v)[5] provides that a lawful permanent resident alien, returning from abroad, is not deemed to be seeking an official "admission" to the United States, and can be admitted summarily, *unless* the alien has been convicted of certain crimes. Since Richardson's conviction for trafficking cocaine is a crime described in INA § 101(a)(13)(C)(v),[6] the immigration judge found that Richardson was "seeking admission" to the United States, that aliens "seeking admission" at the border can request release only from a district director, and that immigration judges lack jurisdiction over such requests.[7] On

---

[4] 8 U.S.C. § 1252 (Supp. 1998). An INS "notice to appear," dated October 26, 1997 was served on Richardson alleging that he was an arriving alien who was a citizen of Haiti, not the United States, and was subject to removal due to his criminal convictions.

[5] 8 U.S.C. § 1101(a)(13)(C)(v) (Supp. 1998).

[6] *Id.*

[7] *See* 8 C.F.R. § 103.1(g)(2)(ii)(B) (1997); 62 Fed.Reg. 10312, 10360 (1997) (codified in 8 C.F.R. § 236.1(c)(5) (Jan. 1, 1998)); *see* footnotes 38 and 40 *infra*.

November 24, 1997, the immigration judge denied Richardson's release request for lack of jurisdiction.[8]

On November 26, 1997, Richardson filed in the district court a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. Richardson filed an amended petition on December 10, 1997. Richardson's petition asserted, *inter alia*, that he was being illegally detained and, at a minimum, was entitled to a hearing before an immigration judge on his release request and not merely consideration by the district director. The INS moved to dismiss Richardson's petition for lack of subject matter jurisdiction.

On December 30, 1997, the magistrate judge issued a report finding statutory habeas jurisdiction under 28 U.S.C. § 2241 and recommending that Richardson be given "an individualized hearing, within 14 days of any order adopting this recommendation at which time the immigration judge should considered [sic] whether petitioner is an arriving alien, and if not, whether and under

---

[8] The proceedings before the immigration judge on Richardson's release request were not recorded or transcribed. On November 24, 1997, the immigration judge signed a form bond order with blanks to check for granting or denying release. The immigration judge checked the box stating that the request for release was denied and wrote "arriving alien" at the bottom of the form. Although nothing in the record clearly establishes that the basis of the immigration judge's decision was a lack of jurisdiction, both parties agree that the immigration judge did not conduct a bond hearing, although witnesses were present ready to testify, and that the immigration judge indicated lack of jurisdiction over Richardson's release request due to his status as an alien seeking admission.

what circumstances petitioner may be released from custody pending the completion of deportation proceedings."

On January 8, 1998, Richardson's removal proceedings concluded with the immigration judge's order that Richardson be removed to Haiti.[9] After a hearing during which Richardson testified and was represented by counsel, the immigration judge found that, because of his criminal convictions, Richardson was "inadmissible" under INA §§ 212(a)(2)(A)(i)(I), 212(a)(2)(A)(i)(II), and 212(a)(2)(C)[10] and not entitled to cancellation of removal under INA § 240A(a).[11] Richardson's appeal of the removal order to the Board of Immigration Appeals ("BIA") remains pending.[12]

---

[9] *In the Matter of Ralph Richardson, Respondent: In Removal Proceedings*, Case #A17-566-876 (Immigration Court, January 1, 1998).

[10] 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1182(a)(2)(A)(i)(II), & 1182(a)(2)(C) (Supp. 1998).

[11] 8 U.S.C. § 1229b (Supp. 1998). Denying cancellation of removal under INA § 240A(a), the immigration judge found that Richardson was statutorily ineligible due to his cocaine-trafficking conviction, deemed an aggravated felony under INA § 101(a)(43). 8 U.S.C. § 1101(a)(43) (Supp. 1998). INA § 240A (a), 8 U.S.C. § 1229b(a) (Supp. 1998), provides that the "Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien – (a) has been an alien lawfully admitted for permanent resident for not less than five years, (2) has resided in the United States continuously for seven years after having been admitted in any status, *and* (3) *has not been convicted of any aggravated felony.*" (Emphasis supplied.)

[12] Richardson's brief was filed with the BIA on October 15, 1998, and the INS brief was due on November 28, 1998.

On February 19, 1998 and over the INS' objections, the district court adopted the magistrate judge's report and recommendations, denied the INS' motion to dismiss and granted Richardson's petition. The district court ordered the immigration judge to hold "an individualized hearing within eleven (11) days from the date stamped on the Order, at which time the Immigration Judge should determine whether Petitioner is an arriving alien, and if not, whether and under what conditions Petitioner may be released from custody pending the completion of deportation proceedings."

This appeal ensued. On February 23, 1998, this Court granted the INS' motion to stay the district court's order pending this appeal. Richardson remains in custody.

II. RICHARDSON'S HABEAS CORPUS PETITION

Before examining the new immigration laws, we outline Richardson's claims. In this case, Richardson does not dispute that he is an alien, that he has a cocaine-trafficking conviction, and that cocaine trafficking is a basis for both inadmissibility and deportability under the INA.[13] Instead, Richardson's habeas corpus petition

---

[13] In the removal hearing before the immigration judge, Richardson contended that the INS' evidence of his criminal conviction for cocaine trafficking was improperly certified, but the judge admitted this evidence of his conviction. The INS also introduced Richardson's sworn statement at inspection that he had a cocaine-trafficking conviction. At the removal hearing, Richardson testified that while he signed the statement, he did not read it because he was "confused," "shocked," and "upset." The immigration judge found that the INS had proved a

asserts, *inter alia*, that his constitutional and statutory rights were violated because:

(1) the INS ignored his thirty-year legal permanent resident alien status, misinterpreted INA § 101(a)(13)(C)[14] in classifying Richardson as an arriving alien "seeking admission," unlawfully detained him, and illegally denied him admission, as opposed to permitting entry into the United States and then initiating removal proceedings based on "deportability;"

(2) the Attorney General's detaining and denying a legal permanent resident alien admission back into the United States and delegating her custody release authority to only the INS district director, without a bond hearing before an immigration judge, are *ultra vires* of the INA and illegal;

(3) the Attorney General's detaining and denying a legal permanent resident alien admission and a bond hearing before the immigration judge solely because of his brief trip abroad violates that resident alien's due process guarantees under the Due Process Clause of the Fifth Amendment; and

(4) the Attorney General's allowing a bond hearing before an immigration judge for legal permanent resident aliens arrested in the United States, but denying a bond hearing to Richardson only because of his two-day

---

cocaine-trafficking conviction. This is one of many issues Richardson has raised on appeal to the BIA; however, this issue was not raised in the district court.

[14] 8 U.S.C. § 1101(a)(13)(C) (Supp. 1998).

sojourn abroad violates the equal-protection guarantees of the Due Process Clause of the Fifth Amendment.

In explaining why he filed his habeas petition while his BIA appeal remained pending, Richardson contends that exhaustion of administrative remedies is futile because the INA, as amended by IIRIRA, eliminates judicial review in the courts of appeals over any prospective BIA final order removing him as a criminal alien, and forecloses appeal of the INS' district director's bond decisions to an immigration judge. Finally, Richardson asserts that INA § 242(g)'s exclusive-jurisdiction provision[15] does not repeal habeas jurisdiction under 28 U.S.C. § 2241 and does not prevent the district court from hearing a permanent resident alien's habeas petition alleging unlawful executive detention in violation of the INA and the Constitution.

Since Richardson attempted to enter the United States on October 26, 1997, IIRIRA's extensive revisions to the INA undisputedly govern this case.[16]

III. NEW IMMIGRATION LAWS

In 1996, Congress twice revised the INA. The changes began incrementally with the enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA") in April

---

[15] 8 U.S.C. § 1252(g) (Supp. 1998).

[16] IIRIRA was signed into law on September 30, 1996 and became effective on April 1, 1997.

1996 and accelerated with IIRIRA's major structural revisions to the INA in September 1996.[17] Congress' reconstruction of the INA includes, *inter alia*, these key elements applicable to Richardson's appeal:

(1) new custody rules mandating detention of aliens after a serious criminal conviction;

(2) new procedures for prompt removal of criminal aliens from the United States;

(3) new restrictions on judicial review that preclude all judicial involvement in the administrative agency removal and detention process until after a final removal order is entered by the BIA;

(4) new provisions directing that judicial review shall be *exclusively* under the INA and in only the court of appeals after a final BIA removal order; and

(5) new provisions removing all other formerly available federal-court jurisdiction over the detention and removal of criminal aliens, including repeal of statutory habeas under 28 U.S.C. § 2241.

Simply put, IIRIRA strips all jurisdiction, including § 2241 habeas, from the district courts, places exclusive judicial review in the court of appeals, and delays even that judicial review until after a final administrative agency order. Congress has reduced judicial review to one time in one place in an effort to expedite the removal

---

[17] Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214 (1996), and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub.L. No. 104-208, 110 Stat. 3009 (1996).

of resident aliens with serious criminal convictions. Since these legislative revisions to the INA are extensive, complicated, and affect so many resident aliens with criminal convictions in such a significant manner, we outline them in detail.

A. "Removal" Proceedings

Upon being denied entry, Richardson was detained and immediately placed in "removal" proceedings.[18] As one of its broad structural changes to the INA, IIRIRA eliminated some of the distinctions between "deportation" and "exclusion" proceedings and created a unified set of proceedings in INA § 240[19] called "removal proceedings."[20] New INA § 240(e)(2) defines the term "removable" as an alien who is "deportable" or an alien who is "inadmissible" (replacing the old term "excludable").[21] New INA § 240(a)(3) provides that unless specified otherwise under the INA, a removal proceeding

---

[18] Before IIRIRA, the INA separated the concepts of exclusion proceedings and deportation proceedings. Different procedural rules applied to proceedings to exclude an alien from entering the United States. *Compare* 8 U.S.C. § 1226 (1996) *with* 8 U.S.C. § 1252b (1996).

[19] 8 U.S.C. § 1229a (Supp. 1998).

[20] 8 U.S.C. § 1229a(a)(1) (Supp. 1998). Removal proceedings were created in INA § 240. Other sections of the INA established the procedures to be employed in removal proceedings. For example, INA § 239, 8 U.S.C. § 1229 (Supp. 1998), established the procedures for the initiation of removal proceedings. INA § 240A, 8 U.S.C. § 1229b (Supp. 1998), established the procedures for the cancellation of removal proceedings.

[21] 8 U.S.C. § 1229a(e)(2) (Supp. 1998).

"shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States."[22]

Under the unified framework in INA § 240, many of the procedures in "removal proceedings" are now the same regardless of whether the alien is seeking admission to the United States or the alien is being deported from the United States.[23] In contrast, the substantive grounds for determining "inadmissibility" and "deportability" are still handled in several separate parts of the INA and vary considerably.[24] However, Richardson's cocaine-

---

[22] 8 U.S.C. § 1229a(a)(3) (Supp. 1998).

[23] Within INA § 240's framework, certain procedures are still differentiated based on whether deportability or inadmissibility is the subject of the removal proceeding. 8 U.S.C. § 1229a (Supp. 1998). For example, INA § 240(c)(2)(A) provides that an alien has the burden of establishing eligibility for admission "clearly and beyond doubt" or "by clear and convincing evidence that the alien is lawfully present in the United States pursuant to a prior admission;" whereas, INA § 240(c)(3)(A) provides that the INS has the burden of establishing by clear and convincing evidence "that the alien is deportable." 8 U.S.C. §§ 1229a(c)(2)(A) (Supp. 1998) & 1229a(c)(3)(A) (Supp. 1998). As discussed infra in footnotes 38 and 40, the INS district director decides bond requests for arriving aliens detained while seeking admission into the United States; whereas, aliens being deported may request bond from an immigration judge.

[24] *Compare* admission qualifications for aliens covered by 8 U.S.C. §§ 1181-1189 (Supp. 1998), with the basis for deporting aliens in 8 U.S.C. § 1227 (Supp. 1998).

trafficking conviction is a sufficient basis alone for both deportation and inadmissibility under the INA.[25]

B. Permanent Resident Criminal Aliens Returning From Abroad

IIRIRA also altered the rules for permanent resident aliens returning from abroad, which is why the INS detained Richardson and immediately initiated "removal proceedings" against him. Under IIRIRA's restructuring, most permanent resident aliens returning from abroad are summarily admitted back into this country.

In this regard, new INA § 101(a)(13)(c) provides that "an alien lawfully admitted for permanent residence in the United States shall not be regarded as *seeking an admission* into the United States for purposes of the immigration laws *unless* the alien":

> (i) has abandoned or relinquished that status
>
> (ii) has been absent from the United States for a continuous period in excess of 180 days
>
> (iii) has engaged in illegal activity after having departed the United States
>
> (iv) has departed from the United States while under legal process seeking removal of the alien

---

[25] *See* 8 U.S.C. § 1182(a)(2) (Supp. 1998) (listing criminal inadmissibility grounds); *Id.* § 1227(a)(2) (listing criminal deportability grounds). A permanent resident alien is "deportable" for many more crimes than a permanent resident alien is deemed "seeking admission" and "inadmissible." *Id.*

> from the United States, including removal proceedings under this Act and extradition proceedings,
>
> (v) *has committed an offense identified in section 212(a)(2) of this Act* [which includes controlled substances], unless since such offense the alien has been granted relief under section 212(h) or 240A(a), or
>
> (vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

INA § 101(a)(13)(C) (emphasis supplied).[26] Section 101(a)(13)(C)(v) references offenses in "section 212(a)(2)," which provides that any alien convicted of a controlled substance offense is inadmissible.[27] Because Richardson

---

[26] 8 U.S.C. § 1101(a)(13) (Supp. 1998). INA §§ 212(a)(2) and (h) are codified in 8 U.S.C. § 1182(a)(2) and (h) (Supp. 1998). INA § 240A(a) is codified in 8 U.S.C. § 1229b(a) (Supp. 1998).

[27] INA § 212(a)(2)(A)(i)(I) and (II), 8 U.S.C. § 1182(2)(A)(i)(I) and (II) (Supp. 1998), includes controlled substance offenses as follows:

> . . . any alien convicted of . . . a crime involving moral turpitude . . . or . . . a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . is inadmissible.

Id. Pre-IIRIRA, certain criminal aliens could seek discretionary relief under INA § 212(h), 8 U.S.C. § 1182(h) (1995), or suspension of deportation under INA § 244, 8 U.S.C. § 1254 (1995). Post-IIRIRA an alien, including a permanent resident alien, convicted of an aggravated felony as defined under INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (Supp. 1998), is statutorily

was a lawful permanent resident with a cocaine-trafficking conviction covered by Section 1182(a)(2), the INS treated him as an arriving alien "seeking admission" to the United States under INA § 101(a)(13)(C) and subjected him to inspection as any other alien arriving to the United States.[28]

C. Supreme Court's *Fleuti* Doctrine

Immediately upon his detention, the INS initiated removal proceedings against Richardson. In turn, Richardson filed his § 2241 habeas petition in the district court. Richardson contended, *inter alia*, that the INS had interpreted erroneously new INA § 101(a)(13)(C), illegally considered him an arriving alien "seeking admission," and therefore unlawfully detained him and denied him admission and bond.

Before 1996, INA § 101(a)(13) provided that a returning permanent resident alien shall not be regarded as making "an entry" into the United States if the alien's presence abroad was not "intended or reasonably . . .

---

ineligible for a waiver under INA § 212(h), 8 U.S.C. § 1182(h) (Supp. 1998), and also statutorily ineligible for cancellation of removal under INA § 240A(a), 8 U.S.C. § 1229b(a) (Supp. 1998). *See* footnote 11 *supra*.

[28] Since under INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C) (Supp. 1998), Richardson was "seeking admission" at a port of entry, the INS treated Richardson an "arriving alien" under INS regulation 62 Fed.Reg. 10312, 10330 (1997) (currently codified in 8 C.F.R. § 1.1(q) (1998)), which states: "The term arriving alien means an alien who seeks admission to or transit through the United States . . . "

expected."[29] In *Rosenberg v. Fleuti*, 374 U.S. 449 (1964), the Supreme Court interpreted "intended" in former INA § 101(a)(13) as an intent to depart the country in a manner "meaningfully interruptive of the alien's permanent residence." The Court held that a lawful permanent resident's "innocent, casual and brief" excursion was not sufficiently interruptive of the alien resident's status to be "intended" and would not be deemed an "entry." *Id.*

Unfortunately for Richardson, IIRIRA replaces former INA § 101(a)(13) with an entirely new statutory scheme.[30] New INA § 101(a)(13)(A) replaces the term "entry" with the terms "admission" and "admitted," which are defined as "the lawful entry of the alien into the United States after inspection and authorization by an

---

[29] INA § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1994), provided:

> (13) The term "entry" means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: Provided, That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception.

Id.

[30] IIRIRA § 301(a) enacted the new version of INA § 101(a)(13), 8 U.S.C. § 1101(a)(13) (Supp. 1998).

immigration officer."[31] The statute no longer references an alien's intent. Instead, new INA § 101(a)(13)(C) provides that a lawful permanent resident "shall not be regarded as seeking admission," and thus shall be summarily admitted back into the United States, unless the alien falls under one of the six subparagraphs (i) through (vi) of INA § 101(a)(13)(C) quoted above. Since Richardson's cocaine-trafficking conviction is covered expressly by INA § 101(a)(13)(C)(v), the INS treated Richardson as an arriving alien "seeking admission."[32]

In the district court, the INS stressed that, in another case, the BIA had held that *Fleuti's* "innocent, casual, and brief" rule no longer applies because IIRIRA repealed the statutory language relied upon in *Fleuti*.[33] The INS emphasized that INA § 101(a)(13)(C) no longer defines "admission" with reference to an alien's intent, thus removes the entire *Fleuti* concept, and requires the INS to treat Richardson as "seeking admission."[34] Rejecting the

---

[31] 8 U.S.C. § 1101(a)(13)(A) (Supp. 1998).

[32] *See* footnote 28 *supra*.

[33] *See Matter of Collado-Munoz*, Int. Dec. No. 3333 (BIA Dec. 18, 1997).

[34] *Fleuti* addressed the harsh result of a legal permanent resident alien suddenly being excludable from the United States just because he left the country a few days, while not being deportable for the same conduct. The INS stresses the concern in *Fleuti* is not applicable here as Richardson is both inadmissible and deportable for his crimes. 8 U.S.C. § 1182(a)(2) (Supp. 1998); 8 U.S.C. § 1227(a)(2)(B) (Supp. 1998). New INA § 101(a)(13)(C) is also arguably more favorable for most legal permanent residents as they are able to re-enter the United States automatically for up to 180 days (as opposed to just after a brief trip abroad under *Fleuti*), unless they fall into one of the six categories in INA § 101(a)(13)(C)(i-vi).

INS' position, the district court determined that the INS was not required to treat Richardson as "seeking admission." The district court interpreted new INA § 101(a)(13)(C) as specifying only when a returning alien *may not* be regarded as "seeking admission," as opposed to *shall be* regarded as "seeking admission." The INS submits that the language of INA § 101(a)(13)(C) is explicit and nondiscretionary and that the district court circumvented its plain language.[35]

The proper construction of INA § 101(a)(13)(C) and the *Fleuti* issue are some of the issues Richardson has raised before the BIA in his pending appeal of the immigration judge's removal order.

D. Detention of Criminal Aliens "Seeking Admission"

While his BIA appeal proceeds, Richardson's habeas claims also stem, in part, from IIRIRA's new stringent custody rules for aliens with serious criminal convictions. INA § 235(b)(2)(A) provides that any alien "seeking admission" to the United States who "is not clearly and beyond a doubt entitled to be admitted" "shall be detained" for removal proceedings, as follows:

> . . . in the case of an alien who is an applicant for admission, if the examining immigration officer

---

[35] The INS also asserts that the Attorney General is entitled to deference if her interpretation of an immigration statute is reasonable, citing *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Perlera-Escobar v. Executive Office for Immigration*, 894 F.2d 1292, 1296 (11th Cir. 1990) (quoting *Chevron*).

> determines that *an alien seeking admission* is not clearly and beyond a doubt entitled to be admitted, the alien *shall be detained* for a proceeding under section 240 [removal proceedings].

INA § 235(b)(2)(A) (emphasis supplied).[36]

An alien so detained may seek parole into the United States temporarily. INA § 212(d)(5)(A) provides that the Attorney General "may in his discretion . . . parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit or for reasons deemed strictly in the public interest any alien applying for admission to the United States."[37] At the time of Richardson's attempted entry, the Attorney General's regulations delegated to the INS district director the authority to review "parole" requests.[38] On December

---

[36] 8 U.S.C. § 1225(b)(2)(A) (Supp. 1998). INA § 240 is codified in 8 U.S.C. § 1229a (Supp. 1998).

[37] 8 U.S.C. § 1182(d)(5)(A) (Supp. 1998).

[38] 8 C.F.R. § 103.1(g)(2)(ii)(B) (1997) stated:

> (B) District directors are delegated the authority to grant or deny any application or petition submitted to the Service, except for matters delegated to asylum officers pursuant to part 208 and § 253.1(f) of this chapter, or exclusively delegated to service center directors, to initiate any authorized proceeding in their respective districts, and to exercise the authorities under §§ 242.1(a), 242.2(a) and 242.7 of this chapter without regard to geographical limitations. District directors are delegated authority to conduct the proceeding provided for in § 252.2 of this chapter.

Id.

4, 1997, the district director sent Richardson's counsel a letter outlining Richardson's criminal convictions and denying parole on the basis of no showing of a significant public benefit or urgent humanitarian reasons.[39]

After initial custody and release determinations by the INS district director, aliens may seek release from the immigration judge. However, at the time of Richardson's attempted entry, the Attorney General's regulations provided that immigration judges lacked jurisdiction over release requests by "arriving aliens" facing removal proceedings.[40]

---

[39] Noting that Richardson's criminal convictions included an aggravated felony as defined by INA § 101(a)(43), the district director's letter, dated December 4, 1997, stated: "The release of Mr. Richardson into the community will be of no significant public benefit. Mr. Richardson has not shown that his release would be warranted based upon urgent humanitarian reasons."

[40] 62 Fed.Reg. 10312 (1997) (currently codified in 8 C.F.R. § 236.1(d)(1) (Nov. 3, 1998)) stated:

> Application to immigration judge. After an initial custody determination by the district director, including the setting of a bond, the respondent may, at any time before an order under 8 CFR part 240 becomes final, request amelioration of the conditions under which he or she may be released. Prior to such final order, and except as otherwise provided in this chapter, the immigration judge is authorized to exercise the authority in section 236 of the Act (or section 242(a)(1) of the Act as designated prior to April 1, 1997 in the case of an alien in deportation proceedings) to detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may be released, as provided in § 3.19 of this chapter. If the alien has been released from custody, an application for

E. Detention Under TPCRs in IIRIRA § 303(b)(3)

IIRIRA enacted new mandatory custody rules for certain criminal aliens in both INA § 236(c) and the Transition Period Custody Rules ("TPCRs") in IIRIRA § 303(b)(3). When Richardson attempted to enter the United States, the TPCRs mandated the detention of certain criminal aliens, as follows:

> (A) In General – During the period in which this paragraph is in effect pursuant to paragraph (2), *the Attorney General shall take into custody any alien who* –
>
> > (i) has been convicted of an aggravated felony (as defined under section 101(a)(43)) of the Immigration and Nationality Act, as amended by section 321 of [IIRIRA])
> >
> > (ii) is inadmissible by reason of having committed any offense covered in section 212(a)(2) of such Act

---

amelioration of the terms of release must be filed within 7 days of release. Once a removal order becomes administratively final, determinations regarding custody and bond are made by the district director.

Id. However, 62 Fed.Reg. 10312, 10360 (1997) (codified in 8 C.F.R. § 236.1(c)(5)(i) (Jan. 1, 1998)) stated:

> An immigration judge may not exercise the authority provided in this section, and the review process described in paragraph (d) of this section shall not apply, with respect to . . . [a]rriving aliens as described in § 1.1(q) of this chapter. . . .

Id. This provision was subsequently modified in 8 C.F.R. § 236.1(c)(11) (Nov. 3, 1998).

> (iii) is deportable by reason of having committed any offense covered in section 241(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of such Act (before redesignation under this subtitle), or
>
> (iv) is inadmissible under section 212(a)(3)(B) of such act or deportable under section 241(a)(4)(B) of such act (before redesignation under this subtitle)
>
> when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

IIRIRA § 303(b)(3)(A).[41] The TPCRs mandated Richardson's detention because his cocaine-trafficking conviction is an aggravated felony under the INA[42] and thus

---

[41] The TPCRs are not codified. The text of the TPCRs can be found in the historical notes following 8 U.S.C. § 1226 (Supp. 1998). Richardson argues that the interim TPCRs apply to aliens detained while attempting to gain admission to the United States. Whether these rules apply only to aliens within the United States or to any alien detained by the INS is not material to the resolution of this appeal. The Court assumes without deciding that the detention and release provisions of the TPCRs apply to aliens seeking admission and aliens already in the United States. INA § 101(a)(43) is codified in 8 U.S.C. § 1101(a)(43) (Supp. 1998). INA § 212 is codified in 8 U.S.C. § 1182 (Supp. 1998). INA § 241 is codified in 8 U.S.C. § 1227 (Supp. 1998).

[42] Successive definitions of the term "aggravated felony" have been enacted in INA § 101(a)(43), 8 U.S.C. § 1101(a)(43). As initially enacted in 1988, the term covered only a few serious offenses, such as murder, drug trafficking, and illicit trafficking in firearms. The definition has expanded continually to include

falls under subparagraph (i) of the TPCR in IIRIRA § 303(b)(3)(A). Richardson's cocaine-trafficking conviction is also an offense covered by INA §§ 212(a)(2), 241(a)(2), 212(a)(3)(B), and 241(a)(4)(B),[43] and thus is also covered by the other three subparagraphs (ii), (iii), and (iv) of the TPCR in IIRIRA § 303(b)(3)(A).

The TPCRs also significantly restricted the Attorney General's release authority for the criminal aliens subject to the TPCRs' mandatory detention. The TPCR in IIRIRA § 303(b)(3)(B) provides that the Attorney General "may release" an alien *but only* if the alien is an alien described in subparagraphs (A)(ii) or (A)(iii) of the TPCR in IIRIRA § 303(b)(3), is lawfully admitted, will not pose a danger and is likely to appear for any scheduled proceeding.[44]

---

less serious offenses. The adverse immigration consequences legislated by Congress for permanent resident aliens with an aggravated felony conviction, as defined under the INA, have likewise continued to expand.

[43] 8 U.S.C. §§ 1182(a)(2), 1227(a)(2), 1182(a)(3)(B), & 1227(a)(4)(B) (Supp. 1998).

[44] The TPCR in IIRIRA § 303(b)(3)(B) states:

> (B) Release. – The Attorney General may release the alien only if the alien is an alien described in subparagraph (A)(ii) or (A)(iii) and –
>
> > (i) the alien was lawfully admitted to the United States and satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding, . . .

Subsections (A)(ii) and (A)(iii) describe aliens inadmissible because of an offense described in INA § 212(a)(2) or deportable because of an offense described in INA §§ 241(a)(2)(A)(ii), (A)(iii), (B), (C), or (D). The TPCR in IIRIRA §§ 303(b)(A)(ii) & 303(b)(A)(iii).

Under the TPCRs, the Attorney General could not have released an alien detained because of an aggravated felony conviction because that alien is in a category mandatorily detained under the TPCR in IIRIRA § 303(b)(3)*(A)(i)* and is not in an (A)(ii) or (A)(iii) category subject to release under the TPCR in IIRIRA § 303(b)(3)(B).[45]

When Richardson attempted to enter the country, the Attorney General had implemented regulations delegating her detention and release authority under the TPCRs and INA § 236(c). Under those regulations, the INS district director made an initial determination regarding custody and release of criminal aliens under both the TPCRs and INA § 236(c).[46] After the district director's initial determination, an alien could seek release from an immigration judge.[47] However, immigration judges lacked jurisdiction over release requests of "arriving aliens" facing removal proceedings.[48]

---

[45] Commentators note that since criminal aliens, even if legal permanent resident aliens, are now clearly removable for certain crimes, the mandatory custody rules for criminal aliens were intended to insure removal because criminal aliens no longer have incentive to show up voluntarily for removal proceedings. *See, e.g.*, Peter H. Schuck, *INS Detention and Removal: A "White Paper"*, 11 Geo. Immigr. L.J. 667, 671 (1997). Similarly, the INS acknowledged at oral argument that it is discovering permanent residents convicted of serious crimes when they seek re-entry in part because of the difficulty of finding them through the myriad state courts.

[46] *See* footnote 40 *supra*.

[47] *Id.*

[48] *Id.*

In addition to denying parole, the INS district director's letter, dated December 4, 1997, concluded that Richardson "would have no incentive to appear for Immigration hearings" and thus in effect denied bond as well. Although Richardson was subject to mandatory detention and not eligible for release on bond, it appears that the district director considered release on bond.

F. Detention Under INA § 236(c)

Although enacted by IIRIRA in 1996, new INA § 236(c) *was not in effect* when Richardson attempted to enter the United States on October 24, 1997.[49] IIRIRA § 303(b)(2) allowed the Attorney General to delay the implementation of INA § 236(c) for up to two years by providing notice to Congress that the INS lacked sufficient space and personnel to accommodate the mandate of INA § 236(c). The Attorney General twice provided such notice and delayed the effective date of INA § 236(c) until October 10, 1998. During the two-year interim, the TPCR in IIRIRA § 303(b)(3) supplanted INA § 236(c).[50] As of October 10, 1998, INA § 236(c)(1) also mandates Richardson's detention, whether he is considered inadmissible or deportable, for his criminal convictions, as explained below.

New INA § 236 contains some general custody rules for aliens in removal proceedings and some specific, more stringent, custody rules for certain criminal aliens.

---

[49] INA § 236(c), 8 U.S.C. § 1226(c) (Supp. 1998).

[50] *Id.*

Under INA § 236(a) "[o]n a warrant issued by the Attorney General, an alien *may* be arrested and detained pending a decision on whether the alien is to be removed from the United States."[51] Under INA § 236(a) and (b), the Attorney General *may* grant bond or parole and *may* revoke bond or parole for an alien so arrested.[52]

However, INA § 236(c) provides for mandatory detention of certain criminal aliens, whether inadmissible or deportable. Subparagraph (1) of new INA § 236(c), entitled "Detention of criminal aliens," mandates that the Attorney General *shall take* into custody a criminal alien who falls into one of these four categories:

> (A) is inadmissible by reason of having committed any offense covered in section 212(a)(2),[53]
>
> (B) is deportable by reason of having committed any offense covered in section 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D),[54]

---

[51] 8 U.S.C. § 1226(a) (Supp. 1998) (emphasis supplied).

[52] 8 U.S.C. § 1226(a) and (b) (Supp. 1998).

[53] INA § 212(a)(2), 8 U.S.C. § 1182(a)(2) (Supp. 1998), covers certain crimes involving "moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime," or "a violation of (or a conspiracy or attempt to violate)" any state, federal, or foreign law "relating to a controlled substance."

[54] These sections cover certain multiple criminal convictions in INA § 237(a)(2)(A)(ii), an aggravated felony in § 1227(a)(2)(A)(iii), certain controlled substance offenses in INA § 237(a)(2)(B), certain firearm offenses in INA § 237(a)(2)(C), and other miscellaneous crimes in INA § 237(a)(2)(D). INA §§ 237(a)(2)(A)(ii), (A)(iii), (B), (C) & (D), 8 U.S.C. §§ 1227(a)(2)(A)(ii), (A)(iii), (B), (C) & (D) (Supp. 1998).

> (C) is deportable under section 237(a)(2)(A)(i)[55] on the basis of an offense for which the alien has been sentence[d] to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 212(a)(3)(B) or deportable under section 237(a)(4)(B),[56]
>
> when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

INA § 236(c)(1).[57] Next, subparagraph (2) of new INA § 236(c) provides that the Attorney General "may release" an alien in one of these four mandatory detention classes "only if the Attorney General decides" that the alien's release is necessary to the protection of someone cooperating in the investigation of major criminal activity, *and* the alien satisfies the Attorney General that the alien will not pose a danger to the safety of others and is likely to appear at any scheduled hearing.[58] Richardson's cocaine-

---

[55] INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) (Supp. 1998), covers crimes involving moral turpitude committed within a certain time frame after the date of admission and for which a sentence of one year or longer may be imposed.

[56] INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B) (Supp. 1998), and INA § 237(a)(4)(B), 8 U.S.C. § 1227(a)(4)(B) (Supp. 1998), cover certain "terrorist activities."

[57] 8 U.S.C. § 1226(c)(1) (Supp. 1998).

[58] INA § 236(c)(2), entitled "Release," provides:

> The Attorney General may release an alien described in paragraph (1) only if the Attorney

trafficking offense brings him within several mandatory detention categories in INA § 236(c)(1), but he does not fall within the discretionary release option in INA § 236(c)(2).

G. INA § 236(e) Restricts Review of Bond and Parole Decisions

Of particular relevance to Richardson's situation is INA § 236(e) which applies to detention and release decisions under both INA § 236(c)[59] and the TPCR in IIRIRA § 303. INA § 236(e) significantly restricts the judicial review of the Attorney General's decisions as follows:

> (e) Judicial review
>
> The Attorney General's discretionary judgment regarding the application of this section [236's custody rules] shall not be subject to review. No court may set aside

---

> General decides pursuant to section 3521 of Title 18, that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

INA § 236(c)(2), 8 U.S.C. § 1226(c)(2) (Supp. 1998).

[59] 8 U.S.C. § 1226(c) (Supp. 1998).

> any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

INA § 236(e).[60] Thus, the INS contends that the district court had no jurisdiction to review the INS district director's discretionary decision to grant or deny Richardson bond or parole.

Richardson responds that INA § 236(e) applies to only final, not interim, orders, and that historically bond decisions were considered collateral to the removal proceedings and cognizable under § 2241 habeas in immigration cases. However, INA § 236(e), by its plain language, bars judicial review of the INS' discretionary bond and parole decisions. Nonetheless, we note that Richardson is

---

[60] 8 U.S.C. § 1226(e) (Supp. 1998). Richardson contends that INA § 236(e) does not apply to this case because he was detained while the TPCRs were in place. Although Richardson correctly argues that the TPCRs (and not INA § 236(c)) applied to his detention from October 26, 1997 to October 9, 1998, the TPCRs appear to supplant only INA § 236(c) and not INA § 236(e) for the reasons below.

IIRIRA § 303(b)(2), the effective date provision for IIRIRA § 303(a), allows the Attorney General to delay for up to two years the effective date of INA § 236(c). During the period when INA § 236(c) is not in effect, the TPCRs apply instead of INA § 236(c). However, IIRIRA § 303(b)(2) does not provide that the Attorney General can delay the effective date of new INA § 236(e). Instead, INA § 236(e) is governed by the effective-date provision in IIRIRA § 303(b)(1) which provides the general rule that INA § 236 is effective the same day as the rest of Title III of IIRIRA. In any event, we need not resolve this issue because the two-year delay has expired and INA § 236(e) is now clearly effective.

not actually seeking review of those INS discretionary decisions but instead review of his constitutional claim that denial of bond without a hearing before an immigration judge violates his constitutional rights.

H. Procedures for Removal Hearings

While only the INS district director decided Richardson's request for parole and bond, IIRIRA did not diminish Richardson's right to a full hearing before the immigration judge on the merits of his removal from the United States.[61] Before issuing any removal order, an immigration judge still must hold a hearing[62] in which the alien may be represented by counsel.[63] The alien is entitled to present evidence and cross-examine witnesses presented by the United States.[64] A complete record is required to be kept of all testimony and evidence produced at the hearing.[65] A "criminal alien" subject to

---

[61] *Compare* 8 U.S.C. § 1252 (1995) *with* 8 U.S.C. § 1229a(a)(1) (Supp. 1998).

[62] The hearing can take several forms – a hearing with the alien present, a hearing without the alien's presence if the alien so consents, through a video conference, or over the telephone if the alien so consents. INA § 240(b)(2), 8 U.S.C. § 1229a(b)(2) (Supp. 1998).

[63] Although an alien subject to removal may secure his or her own counsel, according to INA § 240(b)(4)(A) the government is not required to provide counsel to the alien. 8 U.S.C. § 1229a(b)(4)(A) (Supp. 1998).

[64] INA § 240(b)(4)(B), 8 U.S.C. § 1229a(b)(4)(B) (Supp. 1998).

[65] INA § 240(b)(4)(C), 8 U.S.C. § 1229a(b)(4)(C) (Supp. 1998).

removal (either as inadmissible or deportable) has a right to appeal a removal order to the BIA,[66] and the immigration judge "shall inform the alien of the right to appeal."[67]

Represented by counsel, Richardson received a hearing before an immigration judge on the merits of his removal from the United States and has appealed the judge's removal order to the BIA. As of this date, the BIA has not issued its decision.

I. IIRIRA Consolidates Judicial Review in the Court of Appeals

IIRIRA also completed the major overhaul of federal-court jurisdiction over immigration matters begun by the AEDPA. Prior to 1996, INA § 106 set out the judicial-review scheme for deportation and exclusion orders.[68] INA § 106(a)(2) provided for petition for review in the court of appeals.[69] In addition, INA § 106(a)(10) allowed aliens in custody to seek habeas corpus review of final deportation orders under the INA.[70] Aliens also could

---

[66] 8 C.F.R. § 3.1(b)(3) (1998).

[67] INA § 240(c)(4), 8 U.S.C. § 1229a(c)(4) (Supp. 1998).

[68] *See generally* 8 U.S.C. § 1105a (1995).

[69] 8 U.S.C. § 1105a(a)(2) (1995).

[70] 8 U.S.C. § 1105a(a)(10) (1995). *See* general discussion of the old scheme of judicial review and Congress' attempts as early as 1961 to streamline judicial review of deportations to avoid "interminable procedural delays" in deportations through overlapping modes of judicial review. *United States, ex rel. Marcello v. District Director*, 634 F.2d 964, 967-72 (5th Cir. Jan. 1981) (INA § 106(a)(q) discussed in *Marcello* became INA § 106(a)(10).)

rely on 28 U.S.C. § 2241 habeas corpus to challenge INS detention or deportation proceedings.[71]

On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[72] AEDPA § 440[73] repealed INA § 106(a)(10), which had allowed habeas corpus review under the INA. In its place, AEDPA § 440(a) enacted a new INA § 106(a)(10), which states that a final deportation order against an alien deportable for certain criminal offenses "shall not be subject to review by any court."[74]

Five months after the AEDPA, Congress enacted IIRIRA.[75] Section 306 of IIRIRA repealed the entire judicial-review scheme in INA § 106 and replaced it with a new judicial-review scheme in INA § 242. IIRIRA did not eliminate all judicial review. Instead, IIRIRA removed all jurisdiction from the district courts and consoli-

---

[71] *See, e.g., Orozco v. INS*, 911 F.2d 539, 541 (11th Cir.1990).

[72] Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[73] *Id.*

[74] AEDPA § 440(a) amended INA § 106(a)(10), 8 U.S.C. § 1105a(a)(10) (1995), to read:

> Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i), shall not be subject to review by any court.

Id. See footnote 83 *infra* for IIRIRA's amendments to INA § 106(a)(10). INA § 241 is codified in 8 U.S.C. § 1227 (Supp. 1998).

[75] Pub. L. No. 104-208, 110 Stat. 3009 (1996).

dated judicial review into the court of appeals.[76] INA § 242(b)(2) provides that the venue for judicial review is only in the court of appeals.[77]

More importantly, INA § 242(g), entitled "Exclusive Jurisdiction," provides that *except as provided in INA § 242,* no court shall have jurisdiction over aliens' claims arising from the Attorney General's decisions or actions, as follows:

> Except as provided in this section [242] and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or

---

[76] As outlined *infra* at footnote 93, INA § 242(e)(2) does provide for a truncated form of habeas review for non-resident aliens summarily rejected at ports of entry without any removal proceedings. 8 U.S.C. § 1252(e)(2) (Supp. 1998). Throughout the remainder of this opinion, we repeatedly note that IIRIRA consolidates all judicial review into one procedure – a petition for review in the court of appeals after a final removal order has been issued. We note that INA § 242(e)(2), 8 U.S.C. § 1252(e)(2) (Supp. 1998), remains a narrow exception to our statement about IIRIRA's providing for judicial review in only the court of appeals. Since that narrow exception applies only to non-resident aliens in limited circumstances, it has no applicability here or to any immigration cases involving resident aliens.

[77] INA § 242(b)(2), 8 U.S.C. § 1252(b)(2) (Supp. 1998), provides:

> The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings.

Id.

> execute removal orders against any alien under this Act.

INA § 242(g).[78]

IIRIRA also mandated the timing of the INA's exclusive judicial review. INA § 242(b)(9) proscribes that judicial review shall be only after a final removal order, as follows:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this chapter shall be available only in judicial review of a final order under this section.

INA § 242(b)(9).[79] INA § 242(d)(1) mandates that "a court may review a final order of removal only if . . . the alien

---

[78] 8 U.S.C. § 1252(g) (Supp. 1998). This Court recently held that INA § 242(g) divests district courts of jurisdiction over removal orders under former INA § 106(a)(10) and that "judicial review of orders of removal may only be initiated in the court of appeals" under the INA. *Auguste v. Reno*, 152 F.3d 1325, 1328 (11th Cir. 1998). *Auguste* did not address judicial review under § 2241 habeas because Auguste, a non-criminal alien in custody, filed a habeas petition in the district court pursuant to only INA § 106(a)(10) which provided for habeas review under the old INA. The AEDPA repealed the habeas review in INA § 106(a)(10) and replaced it with the version of INA § 106(a)(10) that restricted judicial review of deportation orders against criminal aliens. Thus, whether INA § 242(g) repealed § 2241 was not discussed in *Auguste*.

[79] INA § 242(b)(9), 8 U.S.C. § 1252(b)(9) (Supp. 1998).

has exhausted all administrative remedies available . . . "[80]

In these new INA provisions, Congress has abbreviated judicial review to one place and one time: only in the court of appeals and only after a final removal order and exhaustion of all administrative remedies. In IIRIRA, Congress strictly regulated the exclusive mode and timing of judicial review in order to remove overlapping jurisdiction and to prevent dilatory tactics previously used to forestall departure of aliens.

J. INA § 242(a)(2)(C) Restricts Review of Removal Orders Against Criminal Aliens

Even within the INA's exclusive judicial-review scheme, Congress further limited what a court of appeals can review after a final removal order. Of particular relevance to Richardson is INA § 242(a)(2)(C), which provides that no court shall have jurisdiction to review "any final order of removal against an alien who is removable" because of certain criminal convictions, as follows:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a

---

[80] 8 U.S.C. § 1252(d)(1) (Supp. 1998). IIRIRA imposes other timing requirements to expedite judicial review. The petition for direct review in the court of appeals must be filed 30 days after a final order, as opposed to 90 days under the pre-IIRIRA version of the INA. *Compare* INA § 242(b)(1), 8 U.S.C. § 1252(b)(1) (Supp. 1998), *with* former INA § 106a(a)(1), 8 U.S.C. § 1105a(a)(1) (Supp. 1996).

> criminal offense covered in section 212(a)(2) [covers certain controlled substance offenses] or 237(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 237(a)(2)(A)(ii) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 237(a)(2)(A)(i).

INA § 242(a)(2)(C).[81] Section 212(a)(2)[82] includes Richardson's cocaine-trafficking conviction.

New INA § 242(a)(2)(C) is similar to former INA § 106(a)(10) which also placed restrictions on judicial review of deportation orders against criminal aliens.[83] As

---

[81] 8 U.S.C. § 1252(a)(2)(C) (Supp. 1998). INA § 212(a)(2) is codified in 8 U.S.C. § 1182(a)(2). INA § 237(a)(2) is codified in 8 U.S.C. § 1227(a)(2) (Supp. 1998).

[82] 8 U.S.C. § 1182(a)(2) (Supp. 1998).

[83] *See* footnotes 74 and 176 in order to *compare* INA § 106(a)(10), as amended by the AEDPA, *with* INA § 242(a)(2)(C), as amended by IIRIRA. IIRIRA made two amendments to INA § 106(a)(10). First, IIRIRA § 306(d) eliminated the phrase "any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i)" and replaced it with the phrase "any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)." IIRIRA § 306(d). This amendment was effective immediately and has been applied by several circuits. *Id.*

IIRIRA's second amendment to INA § 106(a)(10) included more substantial changes, although the end result – new INA § 242(a)(2)(C) – is overall very similar to its predecessor. As a technical matter, IIRIRA repealed INA § 106(a)(10) and replaced it with new INA § 242(a)(2)(C). Altering the language of INA § 106(a)(10) in several respects, IIRIRA added the introductory phrase "Notwithstanding any other provision of law, no court

detailed later, this Court has upheld the judicial review restrictions in former INA § 106(a)(10) as constitutional. *Boston-Bollers v. INS*, 106 F.3d 352 (11th Cir. 1997).

K. INA § 242(a)(2)(B)(ii) Restricts Review of Discretionary Decisions

IIRIRA also limits other aspects of the exclusive judicial review remaining for aliens under the INA. INA § 242(a)(2)(B)(ii) limits judicial review of the Attorney General's discretionary decisions, as follows:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review –
>
> . . .
>
> (ii) any other decision or action of the Attorney General the authority for which is specified under this title to be in the discretion of the Attorney General, other than the granting of relief under section 208(a).

INA § 242(a)(2)(B)(ii).[84]

---

shall have jurisdiction to review. . . . " and replaced INA § 106(a)(10)'s reference to a final order of "deportation" with a reference to a final order of "removal." Similarly, IIRIRA changed the citations listing the criminal offenses that precluded judicial review to the citations corresponding to the sections amended under IIRIRA. The cumulative result of the two amendments enacted by IIRIRA is new INA § 242(a)(2) which limits the judicial review of removal orders based on certain criminal convictions with language similar to that in former INA § 106(a)(10).

[84] 8 U.S.C. § 1252(a)(2)(B)(ii) (Supp. 1998). INA § 208(a) is codified in 8 U.S.C. § 1158(a) (Supp. 1998). The INS asserts that

IV. DISCUSSION

Against this backdrop, Richardson filed his habeas petition in the district court under 28 U.S.C. § 2241. Given IIRIRA's overhaul of the judicial-review scheme in immigration cases, the first question we must address is whether INA § 242(g), as enacted by IIRIRA, has eliminated federal jurisdiction under § 2241 over Richardson's habeas petition.[85]

INA § 242(a)(2)(B)(ii) is a complete bar to judicial review of any discretionary decision to deny bond and parole to Richardson. Even if that position is well founded, Richardson points out that he is not seeking review of the discretionary denial of bond and parole or the discretionary authority to delegate bond decisions to the INS district director. Instead, Richardson seeks review of his constitutional claims that denial of a bond by the INS district director, without a bond hearing before an immigration judge, violated his constitutional rights under the Due Process Clause of the Fifth Amendment. *See* footnote 179 *infra*.

[85] 28 U.S.C. § 2241 (1994) states:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

Id.

A. INA § 242(g) Precludes § 2241 Habeas Jurisdiction Over Immigration Decisions

We begin by recognizing and applying established canons of statutory construction applicable to immigration statutes. First, ambiguities in the law are to be interpreted in favor of the alien.[86] Second, restrictions on jurisdiction are to be read narrowly, courts should not assume that jurisdiction is repealed unless the statute says so explicitly, and repeals by implication of jurisdictional statutes are disfavored.[87]

Although guided by these same principles, courts are divided on whether the new INA § 242(g) abrogates statutory habeas, as provided in § 2241, over an alien's petition challenging detention or a final removal order. *See Hose v. INS*, 141 F.3d 932, 934-35 (9th Cir.) (holding that INA § 242(g) deprives district court of habeas corpus jurisdiction pursuant to 28 U.S.C. § 2241), *withdrawn and reh'g en banc granted*, ___ F.3d ___, No. 97-15789 (9th Cir. December 2, 1998);[88] *Cabrera v. Reno*, 5 F. Supp. 2d 244,

---

[86] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 9-10 (1948).

[87] *See McNary v. Haitian Refugee Ctr.*, 498 U.S. 479, 496 (1991); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670-72 (1986).

[88] This Court notes two points relevant to the *Hose* decision. First, although *Hose v. INS* held that INA § 242(g) repealed § 2241 habeas over a non-criminal alien's claims for discretionary relief, the Ninth Circuit subsequently held that INA § 242(g) is unconstitutional when applied to certain criminal aliens who cannot obtain judicial review under INA § 242(a)(2)(C). *Magana-Pizano v. INS*, 152 F.3d 1213 (9th Cir. 1998). Therefore, the Ninth Circuit concluded that INA § 242(g)

245-46 (D.N.J. 1998) (same); *Ray v. Reno*, 3 F. Supp. 2d 1249, 1251 (D. Utah 1998) (same); *Rusu v. Reno*, 999 F. Supp. 1204, 1209-10 (N.D. Ill. 1998) (same); *Mendez-Tapia v. Sonchik*, 998 F. Supp. 1105, 1107 (D. Ariz. 1998) (same); *Marriott v. Ingham*, 990 F. Supp. 209, 213-14 (W.D.N.Y. 1998) (same); *Mustata v. United States Dep't of Justice*, 979 F. Supp. 536, 539 (W.D. Mich. 1997) (same); *Mayers v. Reno*, 977 F. Supp. 1457, 1461 (S.D. Fla. 1997) (same); *Udenze v. Strapp*, 977 F. Supp. 418, 421 (N.D. Tex. 1997) (same); *Moore v. District Director, INS*, 956 F. Supp. 878, 882 (D. Neb. 1997) (same); *see also Yang v. INS*, 109 F.3d 1185, 1195 (7th Cir.) (stating in dicta that "effective April 1, 1997, § 306(a) of the IIRIRA [INA § 242] abolishes even review under § 2241, leaving only the constitutional writ, unaided by statute"), *cert. denied sub nom, Katsoulis v. INS*, 118 S. Ct. 624 (1997). *But see Goncalves v. Reno*, 144 F.3d 110, 113, 120-21 (1st Cir. 1998) (holding that IIRIRA did not eliminate § 2241 habeas corpus jurisdiction); *Jean-Baptiste v. Reno*, 144 F.3d 212, 218-20 (2d Cir. 1998)[89]

---

does not repeal § 2241 in its entirety but that criminal aliens may proceed in the district court under § 2241, whereas the non-criminal alien in *Hose* could not proceed under § 2241. Second, this Court notes that the Ninth Circuit has granted a rehearing en banc and withdrawn its published decision in *Hose*. Nevertheless, this Court still finds persuasive the reasoning in *Hose* and the Ninth Circuit's subsequent discussion of *Hose* in *Magana-Pizano*.

[89] A subsequent Second Circuit decision in *Henderson v. Reno*, 157 F.3d 106, 119 n.9 (2d Cir. 1998), followed *Jean-Baptiste* but noted that "[w]ere we not bound by *Jean-Baptiste*, the members of the panel would be strongly inclined to find that the proper mechanism for judicial review is by petition for review in the courts of appeals, rather than by § 2241 habeas in the district courts."

(same); *Tam v. INS*, 14 F. Supp. 2d 1184, 1187-88 (E.D. Cal. 1998) (same); *Lee v. Reno*, 15 F. Supp. 2d 26, 37 (D.D.C. 1998) (same); *Barrett v. INS*, 997 F. Supp. 896, 900 (N.D. Ohio 1998) (same); *Gutierrez-Martinez v. Reno*, 989 F. Supp. 1205, 1209 (N.D. Ga. 1998) (same); *Morisath v. Smith*, 989 F. Supp. 1333, 1338 (W.D. Wash. 1997) (same); *Mojica v. Reno*, 970 F. Supp. 130, 157 (E.D.N.Y. 1997) (same).

After review, we conclude that INA § 242(g) abrogates jurisdiction over Richardson's § 2241 habeas corpus petition for several reasons. First, the language of INA § 242(g) is plain and clear. INA § 242(g)'s language that "[e]xcept as provided in this section [242] . . . no court shall have jurisdiction" clearly and unequivocally precludes any jurisdiction in the district court except that provided in INA § 242.[90] INA § 242 does not permit the kind of habeas corpus review in the district court Richardson sought. Instead, INA § 242 provides for judicial review for aliens only in the court of appeals and only after a final removal order.

More importantly, INA § 242(g)'s broad admonition that it applies "notwithstanding *any* other provision of law" sufficiently and clearly encompasses other provisions of law, such as § 2241.[91] When Congress says

---

[90] *See Auguste v. Reno*, 152 F.3d 1325, 1328 (11th Cir. 1998), and footnote 78 *supra*.

[91] 8 U.S.C. § 1252(g) (emphasis supplied). *See, e.g., United States v. Gonzales*, 117 S. Ct. 1032, 1035 (1997) ("Read naturally the word 'any' has an expansive meaning, that is 'one or some indiscriminately of whatever kind.' ") (citation omitted); *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1185 (11th Cir. 1997) (" 'Congress did not add any language limiting the breadth of that word,' so 'any' means all.") (*quoting in part Gonzales, supra*).

"any," it means "any" law, which necessarily includes § 2241.[92]

In addition, while INA § 242 consolidates judicial review in the court of appeals for aliens, there is another section within INA § 242 that does permit limited habeas corpus review under INA § 242*(e)(2)*[93] for certain *non-*

---

[92] On other occasions, this Court found that "notwithstanding any other provision of law" means precisely "notwithstanding any other provision of law," especially where the Court's jurisdiction is involved. *Allen v. David*, 334 F.2d 592, 597-98 (5th Cir. 1964); *United States v. C.E. Sykes*, 310 F.2d 417, 419-20 (5th Cir. 1962).

[93] INA § 242(e)(2), 8 U.S.C. § 1252(e)(2) (Supp. 1998), provides for habeas review for non-resident arriving aliens subject to expedited and summary removal under 8 U.S.C. § 1225(b)(1):

> (2) Habeas corpus proceedings
>
> Judicial review of any determination made under section 235(b)(1) is available in habeas corpus proceedings, but shall be limited to determinations of –
>
> (A) whether the petitioner is an alien,
>
> (B) whether the petitioner was ordered removed under such section, and
>
> (C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 207, or has been granted asylum under section 208 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to Section 235(b)(1)(C).

INA § 242(e)(2), 8 U.S.C. § 1252(e)(2) (Supp. 1998). INA § 235(b)(1) is codified in 8 U.S.C. § 1225(b)(1) (Supp. 1998). INA § 207 is codified in 8 U.S.C. § 1157 (Supp. 1998). INA § 208 is codified in 8 U.S.C. § 1158 (Supp. 1998). This procedure,

resident arriving aliens. INA § 235(b)(1) permits a single immigration officer to remove summarily a *non-resident* arriving alien without a removal hearing or review, unless the alien indicates an intention to apply for asylum or indicates fear of persecution.[94] Therefore, INA § 242(e)(2) provides for statutory habeas review under the INA in this narrowly limited situation.[95] This evidences Congress' ability to create statutory habeas review under the INA when it so desires. Congress' express provision of some limited habeas review *within § 242 of the INA* underscores Congress' clear intent in INA § 242(g) that no court shall have jurisdiction over immigration decisions *except as provided under INA § 242.*[96]

Second, in addition to the sweeping language of new INA § 242(g), the elimination of INA § 106(a)(10)'s habeas corpus review by the AEDPA further evidences congressional intent to preclude statutory habeas corpus review over immigration decisions. AEDPA § 440 first eliminated the specific habeas review granted under former INA § 106(a)(10).[97] Then IIRIRA enacted the broad language of INA § 242(g) that "notwithstanding any other provision

---

originally called "summary exclusion," was created by the AEDPA but modified by IIRIRA before taking effect.

[94] INA § 235(b)(1), 8 U.S.C. § 1255(b)(1) (Supp. 1998).

[95] *See* footnote 93.

[96] *See, e.g., United States v. White*, 118 F.3d 739, 742 (11th Cir. 1997) ("The selection of the statutes set forth [in the Act] reflects an intent to omit all others."); *United States v. Koonce*, 991 F.2d 693, 698 (11th Cir. 1993) ("The canon of statutory construction that the inclusion of one implies the exclusion of others is well-established.").

[97] Pub. L. No. 104-132, 110 Stat. 1214 (1996).

of law, no court shall have jurisdiction except as provided under INA § 242."[98] Thus, the AEDPA and IIRIRA reflect Congress' clear intent to avoid unduly protracted litigation over removal orders against resident aliens by consolidating all judicial challenges in the courts of appeals under INA § 242(b)(2) after a final removal order, and by removing all district-court jurisdiction, including § 2241 habeas jurisdiction, over immigration decisions.[99] Accordingly, we conclude that INA § 242(g) repeals any statutory jurisdiction over immigration decisions other than that conferred by INA § 242. That repeal includes § 2241 habeas jurisdiction over immigration decisions by the Attorney General under the INA.

Richardson's main argument is that § 2241 habeas corpus jurisdiction survives IIRIRA's enactment of new INA § 242(g) because INA § 242(g) fails to mention § 2241 expressly.[100] Richardson emphasizes the presumption

---

[98] 8 U.S.C. § 1252(g) (Supp. 1998).

[99] *See, e.g.*, H. Rep. No. 104-469(I) (1996). Indeed, INA § 242(g), along with INA § 242(b)(9), should be properly understood not as an attempt to divest the courts of jurisdiction they previously possessed, but as Congress' effort to make absolutely clear what should have been apparent under the INA and AEDPA all along: that review of INS' conduct of deportation proceedings is available only after the entry of a final order of deportation, and only under the INA provisions specifically provided for that purpose.

[100] Richardson also asserts that INA § 242(g) affects only final removal orders and that the INS ignores the critical distinction between review of interim detention orders – denying admission, bond and parole – and review of final removal orders. We disagree. The INS' interim orders and actions are not collateral proceedings but are inextricably part

against implied repeal of habeas corpus jurisdiction addressed in *Felker v. Turpin*, 518 U.S. 651 (1996).

However, the jurisdictional repeal at issue in *Felker* was much narrower than the repealing language of INA § 242(g). AEDPA § 106(b)(3)(E) repealed a narrow class of Supreme Court jurisdiction – the Court's review of a court of appeals decision denying or granting authorization to file a second or successive habeas corpus petition.[101] In addition, AEDPA § 106(b) specifically cited § 2244(b) as the statute it amended. In *Felker*, the Supreme Court determined that this express prohibition of a specific, limited form of judicial review of second or successive habeas corpus petitions, did not also repeal by implication the Supreme Court's original jurisdiction to entertain habeas petitions.[102]

Conversely, the repeal of jurisdiction under INA § 242(g) is much broader. INA § 242(g) does not address a limited set of statutory provisions. Instead, the jurisdiction-repealing language in INA § 242(g) states comprehensively that "[e]xcept as provided in this section and notwithstanding any other provision of law, no court

---

of the removal proceedings and covered by the broad language of INA § 242(g). *See, e.g., United States v. Chadha*, 462 U.S. 919, 938 (1983); *Massieu v. Reno*, 91 F.3d 416 (3d Cir. 1996).

101 *Felker*, 518 U.S. at 661. Specifically, AEDPA § 106(b)(3)(E) states "the grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for writ of certiorari." 28 U.S.C. § 2244(b)(3)(E) (Supp. 1998).

102 *Felker*, 518 U.S. at 660.

shall have jurisdiction" over the specified claims.[103] INA § 242(g) expressly repeals any and all jurisdiction except that conferred by INA § 242. Unlike *Felker*, the language of INA § 242(g) does not require repeal by implication. Indeed, Congress could hardly have chosen broader language to convey its intent to repeal any and all jurisdiction except that provided by INA § 242.

Based on the foregoing, we conclude that INA § 242(g) repealed § 2241 habeas jurisdiction over Richardson's claims challenging his executive detention without bond and removal order and that the district court erred in exercising jurisdiction under § 2241.

B. No Constitutional Infirmities to Avoid

Richardson asserts that IIRIRA's elimination of § 2241 jurisdiction means he has no judicial review of his executive detention. Although conceding many aliens can still obtain judicial review in the court of appeals under the INA, Richardson stresses that other limitations within the INA's judicial-review scheme result in his having no judicial review whatsoever. Richardson contends, for example, that INA § 242(a)(2)(C) adds other limits to the judicial review available to criminal aliens and thus he has no judicial review under the INA. Richardson argues that no judicial review whatsoever of his executive detention violates the Due Process Clause, Article III, and the Suspension Clause. For those reasons, Richardson submits INA § 242(g) cannot repeal § 2241 habeas.

---

[103] 8 U.S.C. § 1252(g) (Supp. 1998).

The INS responds that INA § 242(g)'s repeal of § 2241 habeas jurisdiction over immigration decisions creates no constitutional infirmities because the INA does not eliminate all judicial review for Richardson. According to the INS, these new INA provisions, enacted by IIRIRA, do not "operate to bar the court of appeals from redressing substantial claims of constitutional error as part of the petition for review" of any final removal order against criminal aliens. The INS and Richardson vigorously dispute how much judicial review is required under the INA to avoid constitutional infirmities arising from the INA's repeal of § 2241 habeas jurisdiction over immigration decisions. The INS concedes only that any constitutionally required judicial review of administrative agency decisions must occur under the INA and in the form of a petition for review in the court of appeals after a final removal order.

Richardson rejoins that the other circuits have held that INA § 242(g) does *not* repeal § 2241 habeas, in large part, to avoid what the Second Circuit described as "serious constitutional issues" in *Jean-Baptiste*[104] or what the First Circuit termed "serious, novel and complex constitutional issues" in *Goncalves*, stating:

> Finally, our refusal to find express repeal of § 2241 in new INA § 242(g) eliminates the need to address serious, novel and complex constitutional issues. We would be loathe to find a repeal where that repeal creates serious constitutional problems. We note these constitutional

---

[104] 144 F.3d at 219.

> concerns briefly to underscore the wisdom of avoiding them.

Goncalves, 144 F.3d at 122.[105] Similarly, in *Jean-Baptiste*, the Second Circuit outlined how historically habeas was available to aliens, why permanent resident aliens enjoy procedural due process rights, and avoided what it foresaw as "serious constitutional issues" under the Suspension Clause and Due Process Clause. *Jean-Baptiste*, 144 F.3d at 219. The Second Circuit worried that without § 2241 habeas, a permanent resident criminal alien would lack a forum in which to vindicate substantial constitutional rights. *Id.*[106] We agree with Richardson that both

---

[105] Goncalves was a 25-year permanent resident alien subject to a deportation order because of certain criminal convictions. 144 F.3d at 114. His application for discretionary relief under former INA § 212(c), 8 U.S.C. § 1182(c), was denied by the INS because the AEDPA made him ineligible for such relief. *Id.* AEDPA § 440(d) greatly expanded the category of criminal convictions rendering an alien ineligible to apply for INA § 212(c) relief. *Id.* Goncalves filed a § 2241 habeas, rather than a petition for direct review in the court of appeals. *Id.* at 115. The First Circuit held that jurisdiction existed under § 2241 habeas, that § 2241 habeas encompassed legal issues based on statutory construction as well as constitutional claims, and that the AEDPA § 440(d) did not apply retroactively to Goncalves. *Id.* at 123. *But compare Boston-Bollers v. INS*, 106 F.3d 352 (11th Cir. 1997) (holding AEDPA § 440(d), effective April 24, 1996, applies retroactively and listing six other circuits reaching same result). *See* footnote 110 *infra*.

[106] In *Jean-Baptiste*, two permanent resident aliens and one conditional permanent resident alien faced deportation under INA §§ 241(a)(2)(B)(i) and 241(a)(2)(A)(iii) for criminal convictions involving controlled substances. 144 F.3d at 214. Alleging that the INS' deportation procedures deprived them of due process, the aliens filed a proposed class action in district court in which they sought to enjoin their deportation

the First and Second Circuits' holdings that INA § 242(g) did *not* repeal § 2241, stemmed from their adopting a principle of "constitutional avoidance," as opposed to following the plain language of INA § 242(g).

We reject this "constitutional avoidance" approach for two reasons. First, although courts wisely prefer avoiding thorny constitutional issues, the language of INA § 242(g), in our view, is plain, unambiguous, and yields only one permissible statutory construction. *See United States v. Locke*, 471 U.S. 84, 96 (1985) ("[c]ourts cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question."); *American-Arab Anti-Discrimination Comm. v. Reno*, 132 F.3d 531, 532-33 (9th Cir. 1997) (O'Scannlain, J., dissenting from the denial of rehearing en banc) ("Whatever the merits of constitutional avoidance might be, no court may 'avoid' a perceived conflict when the text is unambiguous, as it is here. The avoidance canon, invoked with

---

proceedings. *Id.* The district court dismissed the aliens' complaint for failure to state a claim upon which relief could be granted under Fed. R. Civ. P. 12(b)(6), and the aliens appealed. *Id.*

Holding that INA § 242(g) eliminated the district court's jurisdiction over the aliens' proposed class action, the Second Circuit affirmed the district court's dismissal of the complaint. *Id.* at 218-220. Nevertheless, the court held that INA § 242(g) did not repeal § 2241 jurisdiction over petitions for habeas relief by aliens facing removal from the United States. *Id.* at 220. The Second Circuit still dismissed the aliens' complaint because they "sought federal court jurisdiction under 28 U.S.C. § 1331, not habeas jurisdiction under U.S.C. § 2241." *Id.* at 220. However, the court noted that "in finding that § 2241 habeas review remains available for aliens deemed deportable under certain circumstances to raise constitutional questions, we express no opinion on the permissible scope of that review." *Id.*

such abandon, amounts to nothing less than rewriting the statute."), *cert. granted*, 118 S. Ct. 2059 (June 1, 1998).[107]

Second, examining, not avoiding, Richardson's constitutional concerns, we find that INA § 242(g)'s repeal of § 2241 habeas jurisdiction over immigration decisions does not violate the Due Process Clause and Article III because neither provision mandates judicial review of immigration decisions. This repeal also does not violate the Suspension Clause because Richardson still has adequate and effective judicial review available under the INA. In light of these significant constitutional issues, we outline why in considerable detail.

C. Eleventh Circuit's *Boston-Bollers* Decision

This Circuit already has upheld as constitutional the similar, restricted judicial review afforded criminal aliens under former INA § 106(a)(10), enacted by the AEDPA. *Boston-Bollers v. INS*, 106 F.3d 352 (11th Cir. 1997). Although decided before the effective date of IIRIRA's repeal of § 2241[108] and involving a slightly different statute, *Boston-Bollers* is our necessary starting point because it held that INA § 106(a)(10)'s precluding judicial

---

[107] *See* footnote 169 *infra*.

[108] *Boston-Bollers* was decided on February 5, 1997. Although Congress enacted IIRIRA on September 30, 1996, with some limited technical amendments thereafter in October 1996, IIRIRA § 309(a) provided for a general effective date of April 1, 1997. Although there is some dispute over whether certain parts of IIRIRA were effective immediately on September 30, 1996, or only after April 1, 1997, *Lalani v. Perryman*, 105 F.3d 334, 336 (7th Cir. 1997), that question is of no continuing significance because both dates have now passed.

review of a deportation order against a permanent resident criminal alien[109] did not violate the Due Process Clause or Article III.[110]

Quoting from *Reno v. Flores*, 507 U.S. 292, 305 (1993), this Court recognized that the "responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government," and that "over no conceivable subject is the legislative power of Congress more complete." *Boston-Bollers*, 106 F.3d at 355.[111] Accordingly, this Court determined that INA § 106(a)(10) did not

---

[109] Paul Boston-Bollers entered the United States as a lawful permanent resident in January 1987. 106 F.3d at 353. In 1992, Boston-Bollers pled guilty to second-degree murder which made him deportable under INA § 241(a)(2)(A)(iii) for a conviction of an "aggravated felony" as defined under the INA. *Id.*

[110] In holding that AEDPA applied retroactively to Boston-Bollers' pending appeal, this Court found that INA § 106(a)(10), as enacted by AEDPA § 440(d), did not impair Boston-Bollers' substantive rights but was a jurisdiction-eliminating statute. Therefore, this Court declined to apply the Supreme Court's presumption against the retroactive application of statutes which impair substantive rights, citing *Landgraf v. USI Film Prod.*, 511 U.S. 244, 265 (1994). *Boston-Bollers*, 106 F.3d at 354 (listing six other circuits reaching same result). *See* footnote 105 *supra*.

[111] *See also Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) (noting that this Court's decisions "have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."); *Fiallo v. Bell*, 430 U.S. 787, 794-95 (1977); *Kleindienst v. Mandel*, 408 U.S. 753, 765-67 (1972); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-90 (1952).

violate the Due Process Clause because deportation is not a criminal proceeding or punishment and no judicial review is guaranteed by the Due Process Clause, stating:

> This restriction of federal court jurisdiction does not violate the Due Process Clause. As the Supreme Court stated in *Carlson v. Landon*, "[t]he power to expel aliens, being essentially a power of the political branches of government, the legislative and executive, may be exercised entirely though [sic] executive officers, with such opportunity for judicial review of their action as congress may see fit to authorize or permit." 342 U.S. 524, 537, 72 S. Ct. 525, 532-33, 96 L.Ed. 547 (1952) (internal quotation omitted). And since "[d]eportation is not a criminal proceeding and has never been held to be punishment . . . [n]o judicial review is guaranteed by the Constitution." *Id.* at 537, 72 S. Ct. at 533 (footnote omitted). Because the Constitution does not give aliens the right to judicial review of deportation orders, section 440(a)(10) does not violate the Due Process Clause.

106 F.3d at 355.[112]

---

[112] In *Carlson v. Landon*, 342 U.S. 524, 528-29 (1952), the alien brought a habeas corpus petition alleging his detention without bond violated the Due Process Clause of the Fifth Amendment and the Eighth Amendment. Because the alien had access to a petition for habeas, there was no claim of conflict with the Suspension Clause. *Id.* at 528. The Supreme Court found no Due Process Clause or Eighth Amendment violation for the reasons quoted above in *Boston-Bollers. Carlson*, 342 U.S. at 537. However, in between these quotations about the executive and legislative power over expelling aliens, the Supreme Court also stated: "This power is, of course, subject to judicial intervention under the 'paramount law of the Constitution.' " *Carlson*, 342 U.S. at 537 n.27 (citing a long line of Supreme Court precedent).

In addition, this Court concluded that former INA § 106(a)(10) did not offend Article III because Congress and the executive branch exercise plenary authority over immigration regulation. *Id.* at 355. We also recognized that "the federal appellate courts have 'jurisdiction to review certain final orders of deportation and exclusion against aliens only because Congress has conferred it.' " 106 F.3d at 354 (quoting *Duldulao v. INS*, 90 F.3d 396, 399-400 (9th Cir. 1996). Accordingly, this Court concluded that INA § 106(a)(10)'s restricting judicial review of deportation orders against criminal aliens "not only does not violate Article III, it is illustrative of the concept of separation of powers envisioned by the Constitution." *Id.*

Boston-Bollers would resolve Richardson's constitutional concerns were it not for two facts: (1) when this Court interpreted former INA § 106(a)(10) in *Boston-Bollers*, IIRIRA's repeal of § 2241 was not yet effective, and (2) in a footnote, this Court in *Boston-Bollers* expressly recognized that whether INA § 106(a)(10) precluded judicial review of deportation orders against criminal aliens "via a writ of habeas corpus" was not presented in that appeal. *Id.* at 354 n.1.[113]

---

[113] *Boston-Bollers* was before this Court on a petition for direct review of a final deportation order. Both parties agreed "that the issue of whether section 440(a)(10) precludes judicial review of deportation orders via a writ of habeas corpus is not presented in this appeal." 106 F.3d at 354 n.1. In *Yang v. INS*, 109 F.3d 1185, 1195 (7th Cir.), *cert. denied sub nom, Katsoulis v. INS*, 118 S. Ct. 624 (1997), the Seventh Circuit noted that four courts of appeal have rejected contentions that INA § 106(a)(10) violates the Constitution but the *Yang* court pointed out that "they observe that limited opportunity to apply for a writ of habeas corpus may remain," citing *Kolster v. INS*, 101 F.3d 785,

While *Boston-Bollers* informs our analysis, we recognize that it was decided under INA § 106(a)(10) as enacted by the AEDPA, was not colored by the same constitutional concerns created by IIRIRA's repeal of § 2241 habeas in INA § 242(g), and did not address the restrictions now in INA § 242(a)(2)(C) on judicial review of deportation orders against criminal aliens. Nonetheless, we find that these additional circumstances still do not create constitutional infirmities in IIRIRA's new judicial-review scheme. We reach this conclusion not only for the reasons outlined in *Boston-Bollers* but also because Congress clearly has the authority (a) to repeal § 2241 jurisdiction over immigration decisions, (b) to legislate that all judicial review of immigration decisions must be exclusively under the INA, and (c) to regulate the exclusive mode and precise timing of that judicial review within the INA's provisions. As shown below, Congress' repeal of § 2241 and its enactment of the requirement that all judicial review now be exclusively under the INA, in the court of appeals, and after a final removal order do not violate the Due Process Clause, Article III, or the Suspension Clause. We now examine each such constitutional provision in turn.

790-91 (1st Cir. 1996); *Hincepie-Nicto v. INS*, 92 F.3d 27, 30-31 (2d Cir. 1996); *Duldulao v. INS*, 90 F.3d 396, 399-400 & n.4 (9th Cir. 1996). *See also Morel v. INS*, 144 F.3d 248, 251 (3d Cir. 1998); *Mansour v. INS*, 123 F.3d 423, 426 (6th Cir. 1997); *Williams v. INS*, 114 F.3d 82, 83-84 (5th Cir. 1997); *Fernandez v. INS*, 113 F.3d 1151, 1154 (10th Cir. 1997).

D. Due Process Clause

Permanent resident aliens are protected by the Due Process Clause of the Fifth Amendment which provides that "[n]o person shall be . . . deprived of life, liberty or property, without due process of law . . . " U.S. Const. amend. V. Although the political branches exercise plenary control over the admission and removal of aliens, *INS v. Chadha*, 462 U.S. 919 (1983), this plenary authority is subject to the limits of the Constitution. *See, e.g., Galvan v. Press*, 347 U.S. 522, 531 (1954); *Carlson v. Landon*, 342 U.S. 524, 533 (1952).

While an alien seeking initial admission to the United States has no constitutional rights regarding an application for admission, *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950), "once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). The Supreme Court has held that a permanent resident alien "continuously present" in the United States has a right to procedural due process in any proceedings to remove that alien from the country.[114] *See, e.g., Reno v. Flores*, 507

---

[114] Although Richardson's leaving the United States may have changed his legal status under INA § 101(a)(13)(C) to an arriving alien "seeking admission" due to his criminal convictions, we assume solely for purposes of this case that it did not change his constitutional status in light of his thirty-year permanent residency in the United States.

Specifically, the Supreme Court instructs that "[w]e do not regard the constitutional status which petitioner indisputably enjoyed prior to his voyage as terminated by that voyage. From

U.S. 292 (1993); *Landon v. Plasencia*, 459 U.S. at 21.[115] At the core of the alien's due process rights is the right to notice of the nature of the charges and a meaningful opportunity to be heard. *See, e.g., Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-98 (1953).

Removal proceedings under the INA are not criminal proceedings and are not summary ejection proceedings. *See Boston-Bollers*, 106 F.3d 352, 355 (11th Cir. 1997). Instead, removal proceedings are imbued with procedural safeguards that satisfy the Due Process Clause. The alien has the right to notice, the opportunity to

---

a constitutional point of view, he is entitled to due process without regard to whether or not, for immigration purposes, he is to be treated as an entrant alien." *Kwong Hai Chew v. Colding*, 344 U.S. 590, 600 (1953). The alien in *Chew* was a lawful permanent resident who worked on an American ship. *Id.* at 592. He was on a voyage to the Far East for about four months. *Id.* at 594. Upon his return, he was denied entry to the United States under an immigration regulation which allowed the Attorney General to exclude certain aliens without a hearing when information relating to the exclusion would "be prejudicial to the public interest." *Id.* Thus, not only was Chew excluded and detained, he also was denied any notice of the reasons for his exclusion and any opportunity to challenge those reasons. In contrast, Richardson has been afforded extensive procedural safeguards in his removal proceedings.

[115] In *Landon v. Plasencia*, 459 U.S. 21, 31 (1982), the Supreme Court stated: "although we have only rarely held that the procedures provided by the executive were inadequate, we developed the rule that a continuously present permanent resident alien has a right to due process . . . ," citing *United States ex rel. Vajtauer v. Comm'r of Immigration*, 273 U.S. 103, 106 (1927); *Japanese Immigrant Case*, 189 U.S. 86, 100-101 (1903); *United States ex rel. Tisi v. Tod*, 264 U.S. 131, 133 (1924); *Low Wah Suey v. Backus*, 225 U.S. 460 (1912).

present evidence and cross examine witnesses, and the right to do so with the assistance of counsel at a hearing before an immigration judge.[116] Given these procedural safeguards, no judicial review is required to provide the process due to a permanent resident alien facing removal. *See, e.g., Carlson v. Landon*, 342 U.S. 524, 537 (1952); *Boston-Bollers*, 106 F.3d at 354-55; *Yang v. INS*, 109 F.3d 1185, 1196-97 (7th Cir.), *cert. denied sub nom, Katsoulis v. INS*, 118 S. Ct. 624 (1997).[117] Therefore, the fact that IIRIRA repeals § 2241 habeas jurisdiction over immigration decisions, provides for exclusive judicial review under the INA, and within that INA scheme further limits the mode, timing and types of issues for which Richardson can seek judicial review under the INA, does not violate the Due Process Clause.

We recognize that Richardson also asserts that the INA's limiting his bond requests in these removal proceedings to written request to the INS district director, without any judicial review by an immigration judge, deprives him of due process. We disagree. The sufficiency of that process is evaluated under the three factors outlined in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976): (1) a petitioner's interest in additional procedures; (2) the "risk" of the procedure; and (3) the government's interest in the procedure. Richardson's "liberty interest" under

---

116 *See* footnotes 62-67 *supra*.

117 "The role of the judiciary is limited to determining whether the procedures meet the *essential standard of fairness* under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy." *Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982) (emphasis supplied).

the Due Process Clause is weighty, although slightly attenuated given his resident alien status.[118] However, the "risk" factor is low, as Richardson's counsel was able to make written bond and parole requests to the INS district director, supported by evidence, which here included several documents and affidavits on Richardson's behalf.

In contrast, the INS' interest is fairly high in its district director's being able to make parole and bond decisions for arriving aliens facing removal proceedings in that district without a subsequent hearing before an immigration judge. Given the volume of arriving aliens and numerous ports of entry, it simplifies the procedures, expedites consideration, and reduces costs, while still giving the alien an opportunity to request bond and parole.[119] Being the initial step in the removal proceedings, the INS' bond and parole procedures also must be

---

[118] *See, e.g., Mathews v. Diaz*, 426 U.S. 67, 80 (1976) ("Congress regularly makes rules that would be unacceptable if applied to citizens.").

[119] Congress acts well within its plenary power in mandating detention of a criminal alien with an aggravated felony conviction facing removal proceedings. *See* INA § 236(c), 8 U.S.C. § 1226(c) (Supp. 1998); TPCRs in IIRIRA § 303(b)(3). This poses no constitutional issue, for the Supreme Court already has stated that "[t]he Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed . . . " *Carlson v. Landon*, 342 U.S. at 545. The Supreme Court has determined that bail need not be provided in all immigration cases. *Id.* at 546. More importantly, Richardson does not challenge the INS district director's denial of his release request as incorrect under the INS regulations or show why the opportunity to be heard by the regulations governing bond and parole was inadequate.

evaluated in light of the many procedural safeguards in the overall removal proceedings. Indeed, Richardson received a plenary removal hearing before an immigration judge. Richardson has shown no due process violation.

E. Article III

IIRIRA's repeal of § 2241 habeas over INS decisions also does not violate Article III. While § 2 of Article III extends the judicial power to "all cases . . . arising under the Constitution," § 1 of Article III provides that this judicial power shall be vested "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III §§ 1, 2. Even if Richardson had no judicial review available in the district court under § 2241 or in the court of appeals under the INA, Article III does not mandate the judicial review of immigration decisions in any inferior court. Instead, Congress possesses the sole authority to establish the jurisdiction of the inferior federal courts.[120]

---

[120] *See Morel v. INS*, 144 F.3d 248, 251 (3d Cir. 1998); *Chow v. INS*, 113 F.3d 659, 668 (7th Cir. 1997); *Yang v. INS*, 109 F.3d 1185, 1196 (7th Cir.) *cert. denied sub nom, Katsoulis v. INS*, 118 S. Ct. 624 (1997). In finding lack of jurisdiction under former INA § 106(a)(10) over Morel's appeal of a final deportation order, the Third Circuit stated that "we do not see any deprivation of his rights which is of constitutional proportion," noting "the INS concedes that § 440(a) [INA § 106(a)(10)] does not preclude Article III court review of claims of substantial Constitutional error." *Morel*, 144 F.3d at 251. Finding Morel's appeal raised only a "question of law," the Third Circuit concluded that "relevant Supreme Court authority does not mandate judicial review by

The jurisdiction of the inferior federal courts are created by statute and jurisdiction does not exist except to the extent conferred by statute. *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850). Therefore, inferior federal courts must have some statutory basis upon which to retain jurisdiction regardless of the character of Richardson's claims. Similar to many congressionally enacted limits on federal jurisdiction, Article III does not preclude Congress from removing all judicial review over immigration decisions from the inferior courts.[121]

---

an Article III court of questions of law underlying legislatively-created public rights such as immigration. *See Crowell v. Benson*, 285 U.S. 22 (1932) (drawing a distinction between public and private rights and listing immigration as an exemplar of a public right)." *Morel*, 144 F.3d at 252.

[121] Congress has established significant limits on federal jurisdiction throughout history and continuing today. For example, during the first century of the nation's existence, the inferior courts lacked federal-question jurisdiction; and, until 1976 the federal-question jurisdiction remained restricted by an amount-in-controversy requirement. *Yang v. INS*, 109 at 1195. The Seventh Circuit in *Chow v. INS*, 113 F.3d 659, 668 (7th Cir. 1997), also outlined the following reasons why the AEDPA's enacting INA § 106(a)(10), restricting judicial review of deportation orders against criminal aliens, does not offend Article III. Although Article III enumerates cases over which the judicial power shall extend, Article III, however, grants Congress the power "to ordain and establish" such lower federal courts and courts of appeal. *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993); *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 57-60 (1982); *Chow*, 113 F.3d at 670. The Constitution does not prescribe how much judicial power must vest in the inferior courts and leaves it to Congress to make that decision. *Id.* Thus, the Seventh Circuit found that the INA, that limits the lower courts' jurisdiction, is not unconstitutional unless it confers powers not enumerated in the Constitution.

F. Suspension Clause

Contending that he has no judicial review available under the INA, Richardson asserts that the Suspension Clause entitles him to judicial review, and thus Richardson argues INA § 242(g) cannot be read to repeal § 2241 habeas. The Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I § 9. Since "the traditional Great Writ was largely a remedy against executive detention,"[122] the INS concedes that the Suspension Clause requires some limited judicial review of Richardson's executive detention. The INS emphasizes, however, that any constitutionally required judicial review (a) must be found under the INA and not § 2241 habeas, and (b) is limited to only "substantial

---

Sheldon, 49 U.S. (8 How.) at 449. Therefore, the court concluded that the INA does not offend Article III or the separation of powers. *Id.*

[122] *Swain v. Pressley*, 430 U.S. at 386 (Burger, C.J., concurring). The Second Circuit also emphasized that "[t]he primary historical use of the writ of habeas corpus was precisely against executive detention. *See Felker*, 518 U.S. at 663 (noting that the writ originally only extended to prisoners in federal custody who were not "detained in prison by virtue of the judgment of a court" (citation and internal quotation marks omitted))." *Henderson*, 157 F.3d at 120; *see also Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring) ("[T]he historic purpose of the writ has been to relieve detention by executive authorities without judicial trial.").

constitutional claims" or "substantial claims of constitutional error."[123]

The Supreme Court has not defined the level of judicial review preserved by the Suspension Clause, unaided by § 2241 or its precursor statutes, because statutory habeas review historically has been available since 1789.[124] Both parties repeatedly cite *Heikkila v. Barber*, 345

---

[123] The Second Circuit in *Henderson* observed that "the government itself does not argue that the 1996 amendments completely forbid judicial review of deportation against criminal aliens. . . . In its view, the courts are only empowered to examine petitions presenting 'substantial' or 'colorable' constitutional claims, and not petitions involving 'mere' questions of statutory law." *Henderson*, 157 F.3d at 119. As the Second Circuit also noted, "[a]nd well [the INS] might concede this point, for the Supreme Court decided more than seventy-five years ago that the Constitution required judicial review of the executive's decision that a person facing deportation was a non-citizen." *Henderson*, 157 F.3d at 122 n.14 (citing *Ng Fung Ho v. White*, 259 U.S. 276 (1922)). In *Ng Fung Ho*, the Supreme Court stated that the precise question in that habeas petition was whether a claim of citizenship by a resident entitles him to judicial review of his claim. 259 U.S. 276, 282 (1922). The Court held that "[j]urisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact." *Id.* at 284.

[124] The United States Constitution became effective on March 4, 1789. In September 1789, the First Congress passed the Judiciary Act of 1789. Section 14 of the Judiciary Act granted the federal courts jurisdiction to issue writs of habeas corpus. 1 Stat. 81 (1789).

In 1867, Congress significantly expanded federal jurisdiction to issue writs of habeas corpus. 14 Stat. 385 (1867). The Supreme Court has recognized that this amendment to federal habeas jurisdiction increased the scope of habeas review

U.S. 229 (1953), in which the Supreme Court held that "the 1917 Immigration Act . . . clearly had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution." *Id.* at 234-35. The Supreme Court upheld the preclusion of judicial review in the 1917 Act, but in the context of statutory habeas remaining available, stating:

> The rule which we reaffirm recognizes the legislative power to prescribe applicable procedures for those who would contest deportation orders. Congress may well have thought that habeas corpus, despite its apparent inconvenience to the alien, should be the exclusive remedy in these cases in order to minimize opportunities for repetitious litigation and consequent delays

---

beyond the "bare legal review" of the common-law writ. *Johnson v. Zerbst*, 304 U.S. 458, 466 (1938); *see also McCleskey v. Zant*, 499 U.S. 467, 477 (1991) (noting *inter alia* that the 1867 amendments expanded availability of the writ in federal court to people held in state custody). Accordingly, the Court has concluded that this revision to habeas jurisdiction conferred on federal courts the ability to determine the legality and constitutionality of a person's detention even if "the proceedings resulting in incarceration may be unassailable on the face of the record." *United States v. Hayman*, 342 U.S. 205, 212 (1952).

Over the years, Congress amended habeas jurisdiction several times. For the most part, these amendments have related to the form and procedure for seeking the writ and to the codification of federal statutes in 1874 and 1948. Rev. Stat. §§ 751-766 (1874); 62 Stat. 869 (1948). However, the Supreme Court has recently recognized that the Judiciary Act of 1789 is the "direct ancestor" of 28 U.S.C. § 2241(a) and the 1867 amendments to the Judiciary Act are the "direct ancestor" of 28 U.S.C. § 2241(c). *Felker*, 518 U.S. at 659 n. 1 & 2; *see also Hayman*, 342 U.S. at 211 n. 11 (noting that the 1867 Act is [n]ow incorporated in 28 U.S.C. (Supp. IV) § 2241 et seq.)

> as well as to avoid possible venue difficulties connected with any other type of action.

Id. at 237. Thus, *Heikkila* does not resolve the issue here of whether IIRIRA's repeal of § 2241 habeas would violate the Suspension Clause if Richardson has no judicial review under the INA.[125]

Unguided by direct Supreme Court precedent, the Second, Seventh, and Ninth Circuits have thoughtfully addressed and reached different conclusions about what

---

[125] Both Richardson and the INS cite *Webster v. Doe*, 486 U.S. 592, 603 (1988), which involved a discharge of a government employee based on sexual preference. Chief Justice Rehnquist's majority opinion in *Webster* states it reached certain conclusions "to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." (quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n. 12 (1986)). Since we find that certain judicial review remains under the INA, as outlined *infra*, this case also does not present a denial of all judicial review.

Also, two dissents stated that judicial review is not required over constitutional claims challenging the validity of employment decisions by the Central Intelligence Agency. In his dissent, Justice Scalia pointed out that "the denial of all judicial review is not at issue," but "merely the denial of review in United States district courts." *Id.* at 611. Since Article III, § 1 provides that the judicial power shall be vested "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," Justice Scalia stressed that "[w]e long ago held that the power not to create any lower federal courts at all includes the power to invest them with less than all the judicial power." *Id.* His dissent concluded that Congress can prescribe that for certain jobs, the dismissal decision is "committed to agency discretion by law" and "that not all constitutional claims require a judicial remedy." *Id.* at 614.

level of judicial review is protected by the Suspension Clause, what scope of judicial review the INA provides, and whether constitutional infirmities are created by INA § 242(g)'s repeal of § 2241 habeas jurisdiction over immigration decisions. The Second and Ninth Circuits have outlined in great detail the two-hundred year history of the Suspension Clause and why the Great Writ protected by the Suspension Clause (whether under an originalist approach as it existed in 1789 or today) requires judicial review of an alien's executive detention that is the equivalent of § 2241 habeas. *Magana-Pizano v. INS*, 152 F.3d 1213, 1217-21 (9th Cir. 1998); *Henderson v. INS*, 157 F.3d 106, 112-21 (2d Cir. 1998). In *Magana-Pizano*, the Ninth Circuit concluded that INA § 242(g)'s repeal of § 2241 habeas violated the Suspension Clause. In *Jean-Baptiste*, 141 F.3d 212 (2d Cir. 1998), the Second Circuit, in order to avoid the Suspension Clause issue, held that INA § 242(g) did not repeal § 2241 habeas. A subsequent panel of the Second Circuit in *Henderson* followed yet questioned the correctness of the *Jean-Baptiste* decision.

The Seventh Circuit took a different approach. After outlining the history of § 2241 habeas and the Suspension Clause, the Seventh Circuit agreed that "[a]liens may seek the writ that Art. I § 9 cl. 2 preserves against suspension." *Yang v. INS*, 109 F.3d 1185, 1195 (7th Cir. 1997). However, the Seventh Circuit found that "28 U.S.C. § 2241 offers an opportunity for collateral attack more expansive than the Great Writ preserved in the Constitution." *Id.* While *Yang's* direct holding involved the restrictions on a criminal alien's judicial review under former INA § 106(a)(10), the Seventh Circuit noted that "effective April 1, 1997,

§ 306(a) of the IIRIRA [INA § 242] abolishes even review under § 2241, leaving only the constitutional writ, unaided by statute." *Id.* The Seventh Circuit found that the particular errors of law and discretionary INS decision of which Yang, a criminal alien in custody, sought judicial review were simply not protected by the "Great Writ." *Id.* Similarly, the Seventh Circuit noted there is a "vast gulf between the non-suspendable constitutional writ" and certain other forms of judicial review, such as under the Administrative Procedures Act. *Id.*

Below we first discuss the different approaches of these three circuits in considerable detail. Second, we address IIRIRA's clear mandate that judicial review be exclusively after a final removal order – a factor we find not given sufficient weight by our sister circuits. Third, we outline why we find INA § 242(g)'s repeal of § 2241 habeas and its requirement of exclusive judicial review under the INA do not conflict with the Suspension Clause.

G. Second Circuit's *Henderson* Decision

When it decided *Henderson*, the Second Circuit in *Jean-Baptiste* already had held that INA § 242(g) did not repeal § 2241 habeas. *Jean-Baptiste v. Reno*, 144 F.3d 212, 218-19 (2d Cir.1998); *Henderson v. INS*, 157 F.3d 106, 119 (2d Cir.1998). Subsequently, in *Henderson* the Second Circuit revisited whether constitutional issues under the Suspension Clause are actually implicated by IIRIRA's repeal of § 2241 habeas. Noting that it was bound by *Jean-*

Baptiste, the Second Circuit in *Henderson* held that INA § 242(g) did not repeal § 2241.[126]

However, in a footnote, the Second Circuit in *Henderson* expressly acknowledged that "[w]ere we not bound by *Jean-Baptiste*, the members of this panel would be strongly inclined to find that the proper mechanism for judicial review is by petition for review in the courts of appeals, rather than by § 2241 habeas in the district courts."[127] The *Henderson* panel noted that Congress "clearly" meant to streamline judicial review and concluded that *"it seems perverse to find that the new laws [IIRIRA] actually added a layer of review in the district courts that did not generally exist before."*[128]

The Second Circuit in *Henderson* noted that *Jean-Baptiste* expressly had reserved the question of the extent and nature of judicial review remaining available under the INA post-IIRIRA.[129] The *Henderson* panel rejected the INS' contention that judicial review under IIRIRA is limited to "substantial constitutional issues."[130] Instead, the

---

[126] *Henderson*, 157 F.3d at 119.

[127] *Id.* at 119 n.9.

[128] *Id.* (emphasis supplied).

[129] *Henderson*, 157 F.3d at 119.

[130] *Id.* at 120. The Second Circuit also noted that the INS borrowed this standard from the standard for reviewing successive habeas petitions but observed that this standard arose in an entirely different context than presented under the immigration laws. *Id.* Specifically, the Second Circuit recognized that the substantial-constitutional-question standard applied to petitioners in state custody who had necessarily enjoyed several opportunities to challenge their detention before in a judicial forum. *Id.* (citing *Goncalves*, 144 F.3d at 118 n.8). Conversely,

Second Circuit indicated that judicial review post-IIRIRA " 'is much like it was prior to the enactment of the INA' and is similar to that which existed under the early statutes that were 'intended to make these administrative decisions nonreviewable to the fullest extent possible under the Constitution.' "[131] The Second Circuit then noted that the Attorney General's position that no court has power to review her interpretation of immigration laws "is, to put it mildly, not only at war with the historical record described earlier in this opinion – for at least a hundred years, the courts have reviewed the executive branch's interpretation of the immigration laws, and have deemed such review to be constitutionally mandated – it is also hard to square with the core conception of habeas corpus as it has been applied over many centuries."[132]

Ultimately, the Second Circuit in *Henderson* concluded only that whatever the remaining parameters of § 2241 relief in the immigration context, the claims presented by the *Henderson* aliens facing deportation fell within the remaining scope of § 2241.[133] As its holding, the Second Circuit stated "federal courts have jurisdiction

---

according to the *Henderson* panel, aliens detained pending removal from the country are detained by the executive with no prior judicial review of their detention. *Henderson*, 157 F.3d at 120.

[131] *Id.* at 119.

[132] *Id.*

[133] *Id.* at 122. The aliens in *Henderson* presented questions of pure law. The Second Circuit also noted, almost in passing, that judicial review under the INA as long as "the equivalent of habeas" would avoid any conflict with the Suspension Clause. *Henderson*, 157 F.3d at 119 n.10.

under § 2241 to grant writs of habeas corpus to aliens when those aliens are 'in custody in violation of the Constitution or laws or treaties of the United States.' "[134] But, the Second Circuit immediately qualified that holding by stating that "[t]his is not to say that every statutory claim that an alien might raise is cognizable on habeas."[135] Instead, the court concluded that the range of claims available under § 2241 consisted of "the sort that the courts have secularly enforced . . . in the face of statutes seeking to limit judicial jurisdiction to the fullest extent constitutionally possible."[136]

H. Ninth Circuit's *Magana-Pizano* Decision

Two recent Ninth Circuit decisions also address INA § 242(g)'s repeal of § 2241 habeas. In *Hose v. INS*, 141 F.3d 932, 935 (9th Cir.), *withdrawn and reh'g en banc granted*, ___ F.3d ___, No. 97-15789 (9th Cir. December 2, 1998), the Ninth Circuit first held that INA § 242(g) repealed § 2241 jurisdiction, noting that the noncriminal alien in that case still could seek judicial review of the BIA's final deportation order under INA § 242(b)(2) in the court of appeals.[137] Subsequently, in *Magana-Pizano v. INS*, 152

---

[134] *Id.* at 122 (quoting 28 U.S.C. § 2241).

[135] *Id.*

[136] *Id.*

[137] Again, we note that although the Ninth Circuit has withdrawn its published opinion in *Hose*, this Court still finds persuasive the analysis used by the Ninth Circuit in *Hose*.

In *Hose*, after receiving a final exclusion order on April 25, 1997, the alien filed a § 2241 habeas petition in the district court which was dismissed for lack of jurisdiction under INA § 242(g).

F.3d 1213, 1220 (9th Cir.), modified, ___ F.3d ___ (9th Cir. Nov. 13, 1998), the Ninth Circuit held that, unlike the alien in *Hose*, a criminal alien cannot obtain full judicial review in the court of appeals due to INA § 242(a)(2)(C), that INA § 242(g)'s repeal of § 2241 jurisdiction as applied in that different context violated the Suspension Clause,

---

141 F.3d at 933-34. The alien appealed the district court's dismissal, but did not file a petition for direct review in the court of appeals and, importantly, did not request that the court of appeals treat her appeal of the district court's order as a petition for review. *Id.* at 934.

Affirming the district court's dismissal for lack of jurisdiction, the Ninth Circuit first noted that IIRIRA channeled judicial review to the court of appeals and that the language of INA § 242(g) was "clear" and sufficiently broad to convey congressional intent to repeal § 2241 jurisdiction. *Id.* at 935. The court reasoned that the rule disfavoring implicit repeals of jurisdictional statutes was followed in *Felker v. Turpin*, 518 U.S. 651 (1996), because it was interpreting the AEDPA's repeal of a "specific avenue for review" (appellate jurisdiction over a successive habeas petition) and that repeal did not implicitly repeal another separate and distinct avenue for review (the Supreme Court's original habeas jurisdiction) which was not mentioned in the AEDPA. *Hose*, 141 F.3d at 935.

Conversely, the court in *Hose* found the clear language of INA § 242(g) provided that unless jurisdiction otherwise existed under INA § 242, no court could exercise jurisdiction to review a removal order. *Id.* Finally, the court in *Hose* concluded that the Suspension Clause did not prohibit this repeal because no suspension of the writ occurs if a substitute procedure exists that is "neither inadequate nor ineffective to test the legality of a person's detention." *Id.* at 936 (citing *Swain*, 430 U.S. at 381). Since judicial review of exclusion orders remained available under IIRIRA in the form of direct review in the court of appeals, the court held that Ms. Hose had failed to demonstrate how such review was either inadequate or ineffective to contest her detention.

and thus, § 2241 jurisdiction still existed over Magano-Pizano's deportation order.

In light of *Hose*'s holding that INA § 242(g) repealed § 2241, the Ninth Circuit could not construe INA § 242(g) to avoid constitutional issues. The Ninth Circuit found that *Heikkila* established the minimum constitutionally permissible level of judicial review in immigration cases and required the conclusion that, when Congress limits judicial review over immigration matters to the extent permitted by the Constitution, habeas remains available. In other words, the Ninth Circuit found that "[s]imply put, elimination of all judicial review of executive detention violates the Constitution."[138] Based on this premise, the Ninth Circuit concluded that, as interpreted in *Hose* and applied to cases for which no judicial review is available, INA § 242(g)'s repeal of § 2241 was invalid under the Suspension Clause.[139]

Prior to granting rehearing en banc, the Ninth Circuit thus had adopted a hybrid approach to whether INA § 242(g) repeals § 2241. For cases where judicial review remains in the court of appeals under the INA, the Ninth Circuit had interpreted INA § 242(g) as repealing § 2241 jurisdiction.[140] Conversely, for cases in which the Ninth Circuit finds that there is no judicial review under the

---

138 *Magana-Pizano*, 152 F.3d at 1220.

139 *Id.*

140 *Hose*, 141 F.3d at 936.

INA, the Ninth Circuit concluded that INA § 242(g) cannot constitutionally repeal § 2241 habeas and that some form of habeas relief remains available.[141]

I. Seventh Circuit's *Yang* Decision

Although involving former INA § 106(a)(10),[142] the Seventh Circuit's decision in *Yang v. INS*, 109 F.3d 1185, 1187 (7th Cir.), *cert. denied sub nom, Katsoulis v. INS*, 118 S.Ct. 624 (1997), also contains an instructive analysis of the Suspension Clause and Congress' plenary power to remove judicial review over immigration decisions to the full extent permitted by the Constitution. The specific facts and legal issues in *Yang* are an important background to its holding that the INA does not preclude all judicial review of deportation orders against criminal aliens.

After finding that Yang's conviction for concealing stolen firearms was a deportable offense under INA § 241(a)(2)(C), the immigration judge ordered Yang deported because of this conviction, among other reasons.[143] On his petition for direct review in the court of appeals, Yang argued, *inter alia*, that he was not deportable under INA § 241(a)(2)(C) because his conviction for concealing stolen firearms was not a crime involving the

---

[141] *Magana-Pizano*, 152 F.3d at 1220.

[142] The Seventh Circuit in *Yang* interpreted INA § 106(a)(10) as it existed following IIRIRA's first amendment, but before it was amended the second time and moved to INA § 242(a)(C)(2). *See* footnotes 74 and 83 *supra* and 176 *infra*.

[143] *Id.* at 1189.

"possession" of a firearm.[144] Although prior to IIRIRA's repeal of § 2241 habeas, Yang was still faced with a similar judicial review bar in former INA § 106(a)(10) which provided that "[a]ny final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section [designated sections omitted] . . . shall not be subject to review by any court."[145]

According to the INS, Yang was not entitled to judicial review of his final deportation order because the BIA already had determined that he was an alien deportable based on one of the sections referenced in INA § 106(a)(10).[146] Like *Boston-Bollers*, the Seventh Circuit held that INA § 106(a)(10)'s restrictions on judicial review of Yang's deportation order did not violate the Due Process Clause or Article III.[147] The Seventh Circuit also discussed how the review protected by the Suspension Clause is not co-extensive with § 2241 habeas as follows:

---

[144] *Id.* at 1191.

[145] INA § 106(a)(10), 8 U.S.C. § 1105a(a)(10) (1995).

[146] *Id.* at 1192. The *Yang* case actually involved petitions for review by four aliens in separate deportation proceedings. *Id.* According to the Seventh Circuit, in three of these four consolidated cases, the INS contended that the court lacked jurisdiction if the BIA determined that an alien was deportable based on one of the referenced criminal offenses. *Id.* Conversely, the court noted that in one of these cases, the INS adopted a different position. *Id.* Specifically, in the fourth case, the INS argued that the court retained jurisdiction over whether the alien facing deportation was actually an alien deportable for an enumerated offense. *Id.*

[147] *Id.* at 1197.

> Aliens may seek the writ that Art. I § 9 cl. 2 preserves against suspension. But we are reluctant to place weight on its availability, because the Supreme Court long ago made it clear that this writ does not offer what our petitioners desire: review of discretionary decisions by the political branches of government. [Citations omitted.] There is a vast gulf between the non-suspendable constitutional writ and the Administrative Procedure Act. [Citations omitted.] Similarly, in cases under 28 U.S.C. § 2254, "[a] a [sic] federal court may not issue the writ on the basis of a perceived error of state law." *Pulley v. Harris*, 465 U.S. 37, 41, 104 S.Ct. 871, 875, 79 L.Ed.2d 29 (1984). [Citations omitted.] Likewise with errors of federal law. See *United States v. Caceres*, 440 U.S. 741, 752, 99 S.Ct. 1465, 1472, 59 L.Ed.2d 733 (1979) (error "by an executive agency in interpreting its own regulations surely does not raise any constitutional concerns"); *Czerkies*, 73 F.3d at 1443 ("The government does not violate the Constitution every time it mistakenly denies a claim for benefits."). As a practical matter, the right to obtain review, in any court, on the theories our petitioners advance is gone. *That is the point of the legislation. Congress wanted to expedite the removal of criminal aliens from the United States by eliminating judicial review, not to delay removal by requiring aliens to start the review process in the district court rather than the court of appeals.*

Yang, 109 F.3d at 1195 (emphasis supplied). The Seventh Circuit in *Yang* recognized, as did the Second Circuit in *Henderson*, that Congress wanted to eliminate review in the district courts and allow review only in the court of appeals.

In addition to its Suspension Clause discussion, the Seventh Circuit in *Yang* explained how the INA does not abrogate all judicial review for criminal aliens because courts always have jurisdiction to determine whether a jurisdictional bar applies and to consider constitutional attacks on any such jurisdictional bar.[148] The Seventh Circuit explained succinctly that "a court has jurisdiction to determine whether it has jurisdiction."[149] The Seventh Circuit found that the language of INA § 106(a)(10) did not condition its restriction on judicial review merely on the Attorney General's saying that an alien is deportable for one of the enumerated criminal offenses.[150] Instead, the language of INA § 106(a)(10) conditioned its restriction on judicial review on there being "an alien" "who is deportable" "by reason of having committed a criminal offense" enumerated in the statute.[151] The Seventh Circuit noted that "[w]hen judicial review depends on a particular fact or legal conclusion, then a court may determine whether that condition exists."[152] Therefore, the Seventh Circuit held that INA § 106(a)(10) permitted courts to exercise jurisdiction to determine these three threshold issues in order to decide whether the jurisdictional bar in INA § 106(a)(10) applies: (1) whether the person is an alien, (2) whether the alien is deportable,

---

148 *Id.* at 1192.

149 *Id.*

150 *Id.*

151 *Id.*

152 *Id.* at 1192 (citing *Land v. Dollar*, 330 U.S. 731 (1947), for the proposition that the court retains jurisdiction to determine its own jurisdiction).

and (3) whether deportation is based on an enumerated criminal offense.[153]

Without as extensive a discussion as in *Yang*, the Fifth Circuit in *Anwar v. INS*, 116 F.3d 140, 144 (5th Cir.1997), likewise concluded that even under INA § 106(a)(10)'s restrictions on judicial review, it could still exercise some jurisdiction over the alien's petition for review.[154] The

---

[153] *Id.* at 1191-92.

[154] As did the Ninth Circuit in *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir.1997), the Fifth Circuit in *Anwar* applied the pre-IIRIRA version of INA § 106(a)(10). 116 F.3d at 144. However, unlike in *Coronado-Durazo*, the fact that the pre-IIRIRA version of INA § 106(a)(10) applied in *Anwar* meant that the court could exercise jurisdiction over the alien's petition for review. Specifically, the court in *Anwar* noted that prior to IIRIRA, INA § 106(a)(10) precluded the judicial review of a deportation order of an alien who was deportable under INA § 212(a)(2)(A)(ii) (i.e., for multiple criminal convictions of crimes involving moral turpitude) only if both "predicate offenses" were also covered by INA § 212(a)(2)(A)(i). *Id.* An alien was deportable under INA § 212(a)(2)(A)(i) only if the alien had been convicted of a crime involving moral turpitude which crime occurred within five years of when the alien entered the United States and for which the alien was sentenced to confinement for one year or more. *Id.* Because one of *Anwar*'s crimes had occurred more than five years after he entered the United States, the court concluded that his multiple convictions did not fall under INA § 212(a)(2)(A)(i) and thus did not fall under the jurisdictional bar of the pre-IIRIRA INA § 106(a)(10). *Id.*

We note that the Fifth Circuit has recognized an inconsistency between an earlier Fifth Circuit decision, *Pichardo v. INS*, 104 F.3d 756 (5th Cir.1997), and a portion of the *Anwar* decision that is not at issue in this case. *Okoro v. INS*, 125 F.3d 920, 924-25 (5th Cir.1997) (noting the inconsistency between these two decisions); *Anwar*, 116 F.3d at 143 n.2. In *Pichardo*, the

Fifth Circuit noted that under INA § 106(a)(10), "unamended by IIRIRA," judicial review was precluded if deportation was based on two convictions for a crime involving moral turpitude only if both of the convictions occurred within five years of when the alien entered the United States.[155] Because one of Mr. Anwar's criminal convictions occurred more than five years after he entered the United States, the Fifth Circuit concluded that the jurisdictional bar of INA § 106(a)(10) did not apply.[156] Accordingly, the Fifth Circuit proceeded to review the alien's petition.[157]

Despite its lack of extensive discussion, the *Anwar* decision illustrates the same concept followed in *Yang*. The Fifth Circuit did not simply decline to exercise jurisdiction based on the INS' asserted grounds for

---

Fifth Circuit applied the version of INA § 106(a)(10) that included IIRIRA's first amendment to this section – the amendment adding the phrase "without regard to the date of their commission" to INA § 106(a)(10). However, the court in *Anwar* applied INA § 106(a)(10) "unamended by IIRIRA." 116 F.3d at 143. The court in *Okoro* decided to follow the earlier decision of *Pichardo*. *Okoro*, 125 F.3d at 925. Nevertheless, neither *Pichardo* nor *Okoro* diminish the aspect of the *Anwar* decision that illustrates the jurisdictional analysis discussed in *Yang*. Indeed, as was the case in *Anwar* and *Yang*, the court in *Pichardo* also exercised its jurisdiction to the extent necessary to determine whether it could exercise further jurisdiction. 104 F.3d at 758-59. In addition, as discussed below, *Okoro* expressly adopts a holding that is very similar to the holding in *Yang*. *Okoro*, 125 F.3d at 925.

155 *Id.* at 143-44.

156 *Id.*

157 *Id.* at 144.

deportation. Instead, the Fifth Circuit conducted its own review of the allegations supporting deportation to determine whether these allegations prohibited further judicial review. Finding that the judicial-review limiting provisions of INA § 106(a)(10) did not apply, the Fifth Circuit proceeded to entertain the alien's claims.[158]

---

[158] Likewise, the First Circuit in *Choeum v. INS*, 129 F.3d 29, 38 (1st Cir.1997), found the jurisdictional bar in INA § 106(a)(10) did not apply because the deportation order was based on a criminal offense not covered by that section. Although the alien had other criminal offenses which were not charged in the deportation proceedings, the court held "that the INS cannot, consistent with due process and the statutory and regulatory requirements governing its own proceedings, substitute new grounds for deportation at this stage of the proceedings, solely for the purposes of depriving the federal courts of jurisdiction." 129 F.3d at 40.

Also, without extensive discussion, the Ninth Circuit reached a similar conclusion in *Coronado-Durazo v. INS*, 108 F.3d 210, *withdrawn by* 123 F.3d 1322, 1323 (9th Cir.1997). The alien facing deportation in *Coronado-Durazo* claimed that the immigration judge and BIA had erroneously concluded that the alien's conviction for solicitation to possess cocaine was a deportable offense under INA § 241(a)(2)(B)(i) as an offense "relating to a controlled substance." 123 F.3d at 1324. In both of its opinions in *Coronado-Durazo*, the Ninth Circuit began with the premise that if the alien's conviction constituted a deportable offense, the court "lack[s] jurisdiction to review the final order of deportation issued by the INS" because of INA § 106(a)(10) as amended by the AEDPA. 108 F.3d at 211; 123 F.3d at 1323. Without discussing the issue, in both opinions, the Ninth Circuit proceeded on the premise that, under the terms of INA § 106(10), it could review whether the offense upon which deportation was based was a deportable offense. 108 F.3d at 211; 123 F.3d at 1323. *See also Mendez-Morales v. INS*, 119 F.3d 738, 739 (8th Cir.1997) (finding that the petitioner was deportable for conviction of an aggravated felony and therefore jurisdiction

Moreover, in a subsequent decision, the Fifth Circuit expressly adopted the aspect of the *Yang* decision holding that the court of appeals can exercise jurisdiction in order to determine whether a jurisdictional bar precludes further jurisdiction. *Okoro v. INS*, 125 F.3d 920, 925 (5th Cir.1997). *Okoro* involved a petition for review by an alien facing deportation under INA § 241(a)(2)(A)(ii),[159] which provided for the deportation of any alien with two or more convictions of crimes involving moral turpitude.[160] As a "threshold matter," the *Okoro* court examined its own jurisdiction in light of INA § 106(a)(10), as amended by IIRIRA, which precluded judicial review of any final deportation order "against an alien who is deportable by reason of having committed . . . any offense covered by [INA] section 241(a)(2)(A)(ii)[161] for which both predicate offenses are covered by [INA] section 241(a)(2)(A)(i)[162]."[163] Thus, the court held that its jurisdiction depended on whether the alien was deportable based on convictions covered by INA § 241(a)(2)(A)(i) & (ii), as follows:

---

was barred); *Perez v. INS*, 116 F.3d 405, 408 (9th Cir.1997) (reversing agency's findings that the petitioner's crime made him deportable and rendered judicial review unavailable).

159 8 U.S.C. § 1251(a)(2)(A)(i) (Supp.1996).

160 125 F.3d at 922-23.

161 8 U.S.C. § 1251(a)(2)(A)(ii) (Supp.1996).

162 This section is the same jurisdictional bar interpreted by the court in *Yang*. *Compare Okoro*, 125 F.3d at 925 *with Yang*, 109 F.3d at 1188. For a discussion of the amendments to INA § 106(a)(10) by both the AEDPA and IIRIRA and the successor to INA § 106(a)(10) now found in INA § 242(a)(2), *see* footnote 83 *supra*.

163 125 F.3d at 923.

> To determine whether this jurisdictional bar applies to [the alien's] petition for review, we must examine whether the underlying offenses relied on by the INS to deport [the alien] are (1) crimes involving moral turpitude, (2) not arising out of a single scheme of criminal misconduct, and (3) for which [the alien] was sentenced to one year or more of imprisonment, regardless of actual confinement.

Id. at 925 (citing *Yang*, 109 F.3d at 1192). After determining that all three of these elements applied to the alien, the court concluded that it lacked jurisdiction over the alien's petition for review.[164]

In this same vein, this Court's decision in *Boston-Bollers* also exercised jurisdiction both over the legal issue of whether AEDPA § 440(a)(10)'s enactment of INA § 106(a)(10) applied retroactively and over whether that retroactive application violated Mr. Boston-Bollers' constitutional rights. This Court in *Boston-Bollers* was not required to determine the three threshold issues that the courts did in *Yang* or *Anwar*, because the permanent resident alien facing deportation in *Boston-Bollers conceded his alien status, criminal conviction, and deportability.*[165] The parties did not dispute that the alien's petition for direct review fell within the expressed jurisdiction-limiting language of INA § 106(a)(10). Nevertheless, in *Boston-Bollers* this Court exercised jurisdiction over the alien's petition for direct review in the court of appeals attacking the

---

[164] 125 F.3d at 927.

[165] *Boston-Bollers*, 106 F.3d at 353.

constitutionality of the judicial review restrictions in INA § 106(a)(10).

Before we conclude our discussion of the *Yang* decision, we note that the Tenth Circuit in *Berehe v. INS*, 114 F.3d 159, 161 (10th Cir.1997), declined to follow the *Yang* approach. In *Berehe*, the court applied IIRIRA § 309(c)(4)(G), which is a transitional rule restricting the judicial review of the deportation of certain criminal aliens, as follows:

> [T]here shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act . . . or any offense covered by section 241(a)(2)(A)(ii) of such Act . . . for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act. . . .

IIRIRA § 309(c)(4)(G).[166] Rejecting the *Yang* approach, the court concluded that this language did not "permit the

---

[166] According to the court in *Bere*[illegible] the transitional rule found in IIRIRA § 309(c)(4)(G) app[illegible] when deportation proceedings were commenced before II[illegible] date of April 1, 1997 but the final o[illegible] exclusion was entered more than thi[illegible] September 30, 1996 date of enactment. [illegible] the proceedings to deport the alien in *B*[illegible] April 1, 1997 and the order of depor[illegible] October 30, 1996, the court concluded t[illegible] governed the judicial review of the alien's deportation order. *Id.* IIRIRA § 309(c)(4)(G) is similar to bo[illegible] INA § 106(a)(10) as amended by IIRIRA and new INA § 24[illegible](a)(2)(C). See footnotes

court to review the merits of whether an alien is validly deportable by reason of having committed one of the enumerated criminal offenses." *Berehe*, 114 at 161. In reaching this conclusion the court specifically reasoned that:

> *To permit judicial review into the validity of the INS's determination that an alien is deportable by reason of having committed one of the listed crimes, in the guise of making a determination as to the court's jurisdiction, is to permit review of the very fact or condition that the statute appears on its face to be precluding from review. We conclude that such review is contrary to Congress's intent to expedite deportation of criminal aliens.*

Id. at 162.

However, we observe two additional points about the Tenth Circuit's holding in *Berehe*. First, although professing to follow *Berehe*, the Tenth Circuit in a subsequent case reviewed constitutional and statutory claims raised by an alien who had been found deportable for a reason enumerated in INA § 106(a)(10) before the court dismissed the case for lack of jurisdiction. *Willgenstein v. INS*, 124 F.3d 1244, 1245 (10th Cir.1997). Second, in *Berehe*,

[illegible] and (4) the transitional rule in IIRIRA § 309(c)(4)(G) which was applied in *Berehe*. See footnote 83 *supra* for a discussion of the amendments to INA § 106(a)(10).

the Tenth Circuit did not discuss IIRIRA's elimination of § 2241 habeas jurisdiction to review immigration matters, the fact that jurisdiction to review immigration matters remains under only the INA, and the consequent effect of criminal aliens being deprived of all judicial review under the INA. The Seventh Circuit in *Yang* recognized these aspects of the problem and analyzed in considerable detail the potential constitutional issues arising from the limitations placed on its jurisdiction. Accordingly, in addition to being persuaded by the Seventh Circuit's construction of INA § 106(a)(10), we are convinced that the court in *Yang* reached its conclusion after giving appropriate consideration to the issues arising from such severe restrictions on judicial review.

J. INA §§ 242(b)(9) and (d) Require Final Removal Order

Before outlining our conclusions, we discuss another important IIRIRA mandate that our sister circuits, in our view, have not given sufficient weight. Prior to IIRIRA, judicial review of the INS' deportation decisions was unavailable before the entry of a final deportation order. That result was implicit in former INA § 106(a)[167] which provided that review in the courts of appeal was the "sole and exclusive procedure" for challenging a final deportation order and which required exhaustion of administrative remedies as a prerequisite to obtaining judicial review. IIRIRA strengthened these pre-existing

[167] 8 U.S.C. § 1105a (1994).

[168] *See Massieu v. Reno*, 91 F.3d 416, 421 (3d Cir.1996); *see also I.N.S. v. Chadha*, 462 U.S. 919, 938 (1983).

limitations on judicial review. In addition to retaining a mandatory exhaustion provision, IIRIRA added INA § 242(b)(9) which now expressly provides that judicial review is available of only "a final order."[169]

Congress has chosen to delay federal court review of all claims of aliens against whom removal proceedings have been instituted until the conclusion of the administrative proceedings. Neither the district court nor this Court can override that decision. *See, e.g., McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) (stating "where Congress specifically mandates, exhaustion is required"); *Alexander v. Hawk*, ___ F.3d ___ (11th Cir. Nov. 5, 1998). This exhaustion requirement is statutorily mandated by the INA and not judicially created. Although judicially developed exhaustion requirements might be waived for discretionary reasons by courts, statutorily created exhaustion requirements bind the parties and the courts. When a statute requires exhaustion, a petitioner's failure to do so deprives this court of jurisdiction. Importantly,

---

[169] 8 U.S.C. § 1252(b)(9). The judges dissenting to the denial of rehearing en banc in the Ninth Circuit's decision of *Reno v. American-Arab*, concluded that IIRIRA unambiguously foreclosed all judicial review of the non-criminal alien's claims until the entry of a final deportation order and that the INA [illegible] *American-Arab Anti-Discrimination Comm.*, [illegible] (11th Cir. 1998) (allowing aliens' post-IIRIRA to seek an injunction in district court before a final removal order); *cert. granted*, 118 S.Ct. 2059 (June 1, 1998) (granting certiorari on "[w]hether, in light of the Illegal Immigration Reform and Immigrant Responsibility Act, the courts below had jurisdiction to entertain respondents' challenge to the deportation proceedings prior to the entry of a final order of deportation").

mandatory statutory exhaustion is not satisfied by a judicial conclusion that the requirement need not apply due to futility. *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975) (holding that where exhaustion is a statutorily specified jurisdictional prerequisite, "the requirement . . . may not be dispensed with merely by a judicial conclusion of futility").[170]

IIRIRA's mandate is consistent with the long-established administrative law principle that courts should not intervene in an ongoing administrative agency process to reach potential constitutional issues.[171] Deferring Richardson's claims until the entry of a final order of deportation does not raise substantial constitutional concerns. Congress has broad latitude to regulate the mode

---

[170] In *McCarthy*, the Supreme Court noted that where Congress specifically mandates, a plaintiff must exhaust the administrative remedies available to him before he may file in federal court, but held that there was no specific mandate in the pre-PLRA section 1997e(a) context. 503 U.S. at 144.

[171] *See, e.g., FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 239-45 (1980) (holding agency's issuance of an administrative complaint was not subject to review until final agency action despite its evident assumption that the propriety of the initial charging decision would not be subject to administrative review); *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 268-70 (1982) (holding that criminal defendants could not immediately appeal the denial of motion to dismiss indictment based on prosecutorial vindictiveness); *Massieu v. Reno*, 91 F.3d 416, 424-26 (3d Cir.1996) (holding "[a]lthough the immigration judge is not authorized to consider the constitutionality of the statute, this court can hear that challenge upon completion of the administrative proceedings" and dismissing alien's complaint alleging irreparable selective enforcement in retaliation for an exercise of First Amendment rights).

and timing of judicial review of administrative agency decisions, even where constitutional claims are involved. It is a familiar feature of administrative law that a litigant may be required to obtain a final agency decision on all claims before being able to seek judicial review.[172]

This final-decision requirement avoids enmeshing courts in constitutional litigation about the scope of judicial review left under INA that might prove to be unnecessary. For example, Richardson raises numerous statutory issues before the BIA about INA § 101(a)(13)(C) and the *Fleuti* doctrine that, if decided in his favor, would remove certain constitutional issues. This requirement also avoids piecemeal review by consolidating all challenges to the deportation process into a single judicial proceeding. Richardson's contentions that the INA, especially INA § 242(a)(2)(B), unconstitutionally restricts his judicial review can be made in his direct petition for review in the court of appeals, just as the alien did in *Boston-Bollers*. Richardson does not need § 2241 habeas to do that.[173]

---

[172] *See Weinberger v. Salfi*, 422 U.S. 749, 757 (1975).

[173] Although the immigration judge is not authorized to consider the constitutionality of INA § 242(a)(2)(C), the court of appeals can hear such a challenge upon completion of the administrative proceedings. *See I.N.S. v. Chadha*, 462 U.S. 919, 938 (1983). *Ramallo v. Reno*, 114 F.3d 1210 (D.C.Cir.1997). *See* footnote 178 *infra*.

Contrary to Richardson's arguments, the potential for an incomplete record on appeal regarding alleged constitutional violations does not preclude any such violations from being presented during review in the court of appeals. Pursuant to 28 U.S.C. § 2347(b)(3) (Supp.1998), an appellate court can transfer a case to district court in order to develop a more complete factual

K. Alternative Review Under INA Satisfies Suspension Clause

We are not required to resolve the circuits' ongoing debate about whether judicial review under the Suspension Clause approximates § 2241 habeas jurisdiction. This is so because the Supreme Court has held that the Suspension Clause permits Congress to replace habeas corpus with another avenue of judicial review as long as that alternative vehicle is adequate and effective. *Swain v. Pressley*, 430 U.S. 372, 383-84 (1977); *See also Lonchar v. Thomas*, 116 S.Ct. 1293, 1298 (1996). Congress had done just that in enacting IIRIRA. We find that the repeal of § 2241 habeas does not violate the Suspension Clause because the INA, as amended by IIRIRA, still provides adequate and effective judicial review.

In most immigration cases, non-criminal aliens, and even certain criminal aliens, facing removal orders can seek adequate and effective judicial review under the INA by a petition for direct review in the court of appeals after a final removal order. INA §§ 242(b)(2), 242(b)(9), &

---

record if deemed necessary. Accordingly, in the absence of a factual record of an alleged constitutional violation due to an immigration judge's inability to rule on such matters, the court of appeals can upon proffer transfer the case to the district court. *See e.g. Coriolan v. INS*, 559 F.2d 993, 1003 (5th Cir.1977) (Tuttle, J.) (applying the procedures in § 2347 in the immigration context). In Richardson's particular case, we note that the facts in his case are basically undisputed and that his constitutional claims raise primarily legal questions, such as the scope of judicial review required by the Suspension Clause, that are not fact intensive or necessarily in need of record development.

242(d)(1).[174] INA § 242(b)(9) expressly provides that this judicial review covers "all questions of law and fact, including interpretation and application of constitutional and statutory provisions."[175]

A complication arises for Richardson only because the INA, within the confines of the INA, places additional restrictions on the INA-proscribed judicial review for criminal aliens with certain enumerated serious criminal offenses. Richardson asserts that INA § 242(a)(2)(C) precludes all judicial review of removal orders against criminal aliens, and thus INA § 242(g)'s repeal of § 2241 habeas unconstitutionally removes his only remaining vehicle for judicial review. Alternatively, Richardson argues that the INS' proposition – that INA § 242(a)(2)(C) still permits review of "substantial constitutional claims" – does not satisfy the Suspension Clause's requirement of adequate and effective review which, Richardson says, means judicial review of all constitutional and statutory errors.

For several reasons, we reject Richardson's contention that he will not have adequate and effective review under the INA. First, Congress clearly has the power to repeal § 2241 habeas jurisdiction over immigration decisions in the inferior courts and to provide for judicial review of immigration decisions exclusively under a different jurisdictional statute, to wit: the INA. Congress has the power to remove all immigration decisions from the

---

[174] 8 U.S.C. §§ 1252(b)(2), 1252(b)(9), & 1252(d)(1) (Supp.1998).

[175] 8 U.S.C. § 1252(b)(9) (Supp.1998).

jurisdiction of the district courts, which is exactly what Congress has done. Second, in enacting the INA, Congress has the power to outline the mode and timing of judicial review under the INA, to wit: only by direct petition for review in the court of appeals and only after a final removal order.

Third, Congress has the power to mandate detention and removal of aliens with serious criminal convictions and to expedite their removal by limiting judicial review over their detention and removal to the fullest extent allowed under the Constitution. This is why Congress enacted, within the INA's judicial-review scheme, the additional restriction on judicial review found in INA § 242(a)(2)(C).[176]

While INA § 242(a)(2)(C) significantly restricts Richardson's judicial review, we disagree with Richardson's contention that this INA provision leaves him without any judicial review in violation of the Suspension Clause.

---

[176] INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) (Supp.1998) (emphasis supplied), provides:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal *against an alien who is removable by reason of having committed a criminal offense covered in section 212(a)(2)* [covers certain controlled substance offenses] or 237(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 237(a)(2)(A)(ii) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 237(a)(2)(A)(i).

Id. INA § 237 is codified in 8 U.S.C. § 1227 (Supp.1998). INA § 212 is codified in 8 U.S.C. § 1182 (Supp.1998).

Courts of appeal retain jurisdiction under INA § 242(a)(2)(C) to determine whether the jurisdictional bar in that section applies. *See Yang*, 109 F.3d at 1192; *Okoro v. INS*, 125 F.3d at 925; *Anwar*, 116 F.3d at 144; *Coronado-Durazo*, 123 F.3d at 1323. *But cf., Berehe v. INS*, 114 F.3d at 161. INA § 242(a)(2)(C) does not state that judicial review is prohibited if the Attorney General finds that the person being removed is an alien and removable for a reason covered in INA § 242(a)(2)(C). To the contrary, jurisdiction is prohibited if such conditions actually exist. Under the language of INA § 242(a)(2)(C), in order to decide whether the jurisdictional bar applies, courts must determine that the removal order: (1) "is against an alien" (2) "who is removable" (3) "by reason of having committed a criminal offense covered" in certain enumerated sections.[177]

In addition to these three jurisdictional facts, a court of appeal retains jurisdiction to entertain a constitutional attack on this INA statute as part of an alien's petition for review of a final order under the INA.[178] If judicial

---

[177] *See* full text of INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C), at footnote 176 *supra*.

[178] *See Morel v. INS*, 144 F.3d 248 (3d Cir.1998); *Mansour v. INS*, 123 F.3d 423, 426 (6th Cir.1997); *Boston-Bollers*, 106 F.3d 352 (11th Cir.1997); *Okoro v. INS*, 125 F.3d 920, 923 (5th Cir.1997); *Fernandez v. INS*, 113 F.3d 1151, 1154 (10th Cir.1997) (noting the government conceded judicial review was available for "substantial" constitutional errors); *Yang v. INS*, 109 F.3d 1185 (7th Cir.), *cert. denied sub nom, Katsoulis v. INS*, 118 S.Ct. 624 (1997); *Yeung v. INS*, 76 F.3d 337 (11th Cir.1995); *Massieu v. Reno*, 91 F.3d 416, 420-24 (3d Cir.1996) (district court lacked jurisdiction to entertain constitutional challenge to deportation order, which court of appeals had exclusive jurisdiction to

review of a constitutional attack on a jurisdiction-stripping statute in this court of appeals was not foreclosed by INA § 106(a)(10), *Boston-Bollers*, 106 F.3d at 352, it is not foreclosed by INA § 242(a)(2)(C). This approach is consistent with the admonition in *Heikkila v. Barber*, 345 U.S. 229, 234 (1953), that "Congress . . . intended to make these administrative decisions non-reviewable to the fullest extent possible under the Constitution."

Thus, we find that the INA still assures Richardson a significant degree of judicial review in the court of

---

entertain); *Perez-Oropeza v. INS*, 56 F.3d 43, 45-46 (9th Cir.1995); *Raya-Ledesma v. INS*, 42 F.3d 1263, 1265 (9th Cir.), *modified* by 55 F.3d 418 (9th Cir.1994). *But compare Chow v. INS*, 113 F.3d 659, 667 (7th Cir.1997) (deciding jurisdictional bar itself, in INA § 106(a)(10) enacted by AEDPA § 440(a), did not violate Article III or Due Process Clause but declining to find sufficient jurisdiction under that jurisdictional bar to consider the alien's other constitutional claims that procedures in the BIA proceedings violated his constitutional rights because *Chow* still had other potential avenues for relief remaining open for those constitutional claims such as a writ pursuant to 28 U.S.C. § 2241 or 28 U.S.C. § 1651 or Art. I, § 9 cl.2); *Turkhan v. INS*, 123 F.3d 487, 489 (7th Cir.1997) (following *Chow*, and noting other avenues of habeas review were still available and therefore INA § 106(a)(10) is unlike other "true door-closing statutes – [where] the constitutional claims . . . would be reviewed either pursuant to the statutes at issue or not at all"). *Lerma de Garcia v. INS*, 141 F.3d 215, 217 (5th Cir.1998) (holding INA § 106(a)(10) forecloses all judicial review including constitutional claims in the context raised as "criminal deportees retain some opportunity to apply for writs of habeas corpus"). *Williams v. INS*, 114 F.3d 82, 83-84 (5th Cir.1997); *Nguyen v. INS*, 117 F.3d 206, 207 (5th Cir.1997). The courts strictly foreclosing all review under INA § 106(a)(10) did so in large part because § 2241 habeas jurisdiction remained available. That is no longer the case.

appeals after a final removal order, despite INA § 242(a)(2)(C). While that review is definitely restricted, INA § 242(a)(2)(C) does not remove *all* judicial review. Any constitutional infirmities Richardson perceives in that INA-proscribed judicial review must be raised in an attack on the constitutionality of INA § 242(a)(2)(C) only in the court of appeals and only after a final removal order.[179] If review of such questions under INA

---

[179] In addition to his claim that INA § 242(a)(2)(C) conflicts with the Suspension Clause, we recognize that Richardson also alleges that he has been denied equal protection guaranteed under the Due Process Clause of the Fifth Amendment. An alien facing removal from the United States as inadmissible can request review of bond/release decisions only from the INS district director, but an alien being removed based on deportability can seek review from an immigration judge. Richardson contends that this disparate treatment constitutes a violation of equal protection.

As a permanent resident alien, Richardson enjoys equal-protection rights. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). Classifications in the immigration context are subject to the rational-basis standard under which a classification is valid if rationally related to a legitimate government purpose. *Yeung v. INS*, 76 F.3d 337, 339 (11th Cir.1995) (addressing waivers under former INA § 212(h)). An arguable fatal defect in Richardson's equal-protection argument is that most resident aliens returning to the United States can re-enter summarily. Thus, it is returning aliens with serious criminal convictions, not all returning aliens, that are deemed "seeking admission," detained, and restricted to seeking bond from the INS district director. The INS has a valid interest in using ports of entry as a screening mechanism for removing criminal aliens expeditiously and restricting bond decisions to review by the district director, as opposed to admitting them and then instituting deportation proceedings. The Supreme Court has recognized that although a permanent resident alien who is returning from a brief trip abroad enjoys

§ 242(a)(2)(C) does not satisfy the Suspension Clause and INA § 242(a)(2)(C) is held to be unconstitutional, then at worst Richardson will be left with the INA's underlying general judicial review of "all questions of law and fact" available under INA §§ 242(b)(2) and 242(b)(9) in the court of appeals. Such judicial review clearly satisfies the Suspension Clause.

IIRIRA expressly provides for the severability of its numerous provisions.[180] Therefore, even if a court of appeals were to find INA § 242(a)(2)(C) does not satisfy the Suspension Clause, this does not mean that INA § 242(g)'s repeal of § 2241 habeas is unconstitutional. What it means is that without INA § 242(a)(2)(C)'s specific additional limitations on judicial review under the INA, Richardson then could avail himself of the general

---

rights to procedural due process, such aliens do not have a right to "identical treatment" to a permanent resident alien who has not left the country. *Landon v. Plasencia*, 459 U.S. 21, 31 (1982).

Although we briefly comment on the merits of Richardson's equal-protection claim, this claim is precisely the type of claim that Richardson must raise on a petition for review after a final removal order has been issued. Thus, we do not resolve the equal-protection issue or whether review of this type of constitutional claim is permitted under INA § 242(a)(2)(C), or, if not, whether INA § 242(a)(2)(C) violates the Suspension Clause.

[180] IIRIRA Title VI subtitle E specifically provides for severability:

> SEVERABILITY. – If any provision of this division or the application of such provision to any person or circumstances is held to be unconstitutional, the remainder of this division and the application of the provisions of this division to any person or circumstance shall not be affected thereby.

judicial review provided under INA §§ 242(b)(2) and 242(b)(9). Thus, Richardson's concerns at most boil down to whether INA § 242(a)(2)(C) is unconstitutional, and not whether INA § 242(g)'s repeal of § 2241 is constitutional. IIRIRA mandates that constitutional claims about the INA's provisions be made in only one place and one time: in the court of appeals and after a final removal order.[181]

We pause to observe that Richardson's removal order is based on his having a cocaine-trafficking conviction, which is deemed an aggravated felony conviction under the INA and is a basis for both inadmissibility and deportation under the INA. We also note that Richardson does not dispute that he is an alien. Making sure that the BIA record establishes the jurisdictional facts under INA § 242(a)(2)(C) – that the criminal alien: (1) is "an alien," not a citizen; (2) "who is removable"; (3) "by reason of having committed a criminal offense covered" in certain enumerated sections – goes a long way, and very well may be sufficient in this particular type case, to provide an adequate and effective collateral judicial review of the

---

[181] This applies not only to Richardson's claims about INA § 242(a)(2)(C) but also to Richardson's constitutional claims regarding the effect of INA § 236(e) (restricted judicial review of bond and parole decisions) and INA § 242(a)(2)(B)(ii) (restricted judicial review of discretionary decisions). Similar to footnotes 179 and 182, we do not address whether INA § 242(a)(2)(C) permits, or whether the Suspension Clause requires, the judicial review of all constitutional claims or only "substantial constitutional claims" as the INS contends. We do know, however, from *Boston-Bollers* and *Yang* that, at a minimum, judicial review exists under INA § 242(a)(2)(C) to determine whether that jurisdictional bar applies and whether that jurisdictional bar violates the Suspension Clause.

validity of Richardson's execut ve detention and removal order. This is so at least where he sole basis of an alien's being detained and removed is one fact: his having committed an aggravated felony co nviction as defined by the INA.[182] This is especially true since discretionary relief

---

[182] Judicial review of statutory and legal errors is expressly provided for under INA §§ 242(b)(2) and 242(b)(9). In this case, we do not address whether INA § 242(a)(2)(C) permits, or whether the Suspension Clause re quires, the judicial review of statutory or legal errors other tha n to the extent necessary to determine whether a jurisdictional bar to judicial review exists. Several courts have addressed this issue and reached different conclusions.

The Second Circuit reasoned, a beit in dicta, that the nature of the Suspension Clause suggests hat it preserves a writ which encompasses statutory claims. In *H* enderson, the Second Circuit observed that "before the Constit ution was enacted, the writ could only have been granted base on errors of law, since there was no such thing as a constitution l error." 182 F.3d at 121 n.13. The court also noted that, especiall since the Bill of Rights was not adopted until 1791, it would no "have made much sense for the framers to have intended the w it . . . to be available just for the enforcement of rights protecte by the new Constitution." *Id.* Thus, according to the Second C rcuit "the Constitution itself inevitably seems to mandate hab as corpus review of some statutory questions." *Id.* Perhaps as further support for this interpretation, statutory error in executive detention historically have been reviewed under § 2241 and its precursor statutes. *See, e.g., Felker*, 518 U.S. at 661; *Delgadillo v. Carmichael*, 332 U.S. 388, 390-91 (1947); *Bridges v. Wilson*, 326 U.S. 135, 149 (1945); *Kessler v. Strecker*, 307 U.S. 22, 35 (1939); *Mahler v. Eby*, 264 U.S. 32, 46 (1924); *Gegiow v. Uhl*, 239 U.S. 3 (1915); *Gonzales v. Williams*, 192 U.S. 1 (1904); *The Japanese Immigrant Case*, 189 U.S. 86 (1903); *Ekiu v. United States*, 142 U.S. 651 (1892). The precursor statute to § 2241 did not specifically mention that constitutional claims could suppo t the issuance of a writ of habeas corpus until 1867. *See Felke*, 518 U.S. at 659-60.

from, and cancellation of, that type of removal is no longer allowed under the INA.[183]

In summary, Congress through IIRIRA indisputably intended to remove all jurisdiction in the district courts and to abbreviate the judicial review of removal orders against criminal aliens to the fullest extent allowed by the Constitution. Preserving judicial review in the court of appeals under the INA, to the extent necessary to pass constitutional muster, more closely approximates congressional intent than the anomalous situation of disregarding the plain language of INA § 242(g) and preserving a layer of additional judicial review in the

---

Conversely, other courts have concluded that the judicial review under § 2241 is significantly broader than the judicial review available in the writ protected by the Suspension Clause. The Seventh Circuit noted that "28 U.S.C. § 2241 offers an opportunity for collateral attack more expansive than the great writ preserved in the Constitution." Yang v. INS, 109 F.3d at 1193. In this same vein, the Seventh Circuit also noted that "[t]here is a vast gulf between the non-suspendable constitutional writ and the Administrative Procedures Act." *Id.*; *see also Felker*, 518 U.S. at 663 ("The class of judicial actions reviewable by the writ [as known to the Framers] was more restricted as well.").

We recognize that Richardson asserts other legal or statutory errors, such as the *Fleuti* issue, but no court should decide whether jurisdiction exists either under or despite INA § 242(a)(2)(C) to address those errors until after a final removal order. This is what IIRIRA mandates. We need not enter this debate about what the Suspension Clause requires and whether INA § 242(a)(2)(C)'s limitations on judicial review violate the Suspension Clause; even if that section were held unconstitutional, Richardson still has adequate and effective review under INA §§ 242(b)(2) and 242(b)(9).

[183] *See* footnotes 11 and 27 *supra*.

district courts for criminal aliens for whom Congress intended to expedite removal by restricting judicial review to the extent it could.[184]

V. CONCLUSION

After careful consideration, we conclude that INA § 242(g) repeals § 2241 habeas jurisdiction over immigration decisions. Even if this repeal leaves Richardson with no judicial review of his detention or removal, the repeal of § 2241 does not violate the Due Process Clause or Article III. The Due Process Clause is not violated because Richardson's constitutional rights as a permanent resident alien are fully met by the INA's extensive procedures for bond decisions, parole decisions, and removal proceedings. Article III is not violated because Article III does not mandate the judicial review of immigration matters but instead leaves establishing the jurisdiction of the inferior federal courts to Congress.

---

[184] Whether Richardson may seek a writ pursuant to the All Writs Act, 28 U.S.C. § 1651, or an Art. I § 9, cl.2 writ in the Supreme Court is an issue we need not address as Richardson sought only § 2241 habeas jurisdiction. Because we find, to the extent required by the Constitution, Richardson's claims can be sufficiently reviewed under INA §§ 242(b)(2), 242(b)(9), and 242(a)(2)(C), we also do not address the INS' alternative contention that INA § 242(g)'s repeal of § 2241 habeas does not violate the Suspension Clause because some form of "residual" habeas exists under a constitutional writ, unaided by statute, to address "fundamental miscarriage of justice" and that Richardson's constitutional and legal claims do not rise to a "fundamental miscarriage of justice."

This repeal also does not violate the Suspension Clause. INA § 242(a)(2)(C) does not remove all judicial review. At a minimum, judicial review remains available to Richardson under INA § 242(a)(2)(C) to determine if the specific conditions exist that would bar jurisdiction. If the bar applies, jurisdiction remains to consider whether the level of judicial review remaining in INA § 242(a)(2)(C) in a particular case satisfies the Suspension Clause. If not, Richardson can pursue adequate and effective judicial review of statutory and constitutional issues under INA §§ 242(b)(2) and 242(b)(9). However, IIRIRA mandates the mode and timing of any constitutional attack on INA § 242(a)(2)(C) or any other INA provisions: only in the court of appeals, only after a final removal order has been issued, and only after Richardson has exhausted all administrative remedies.

In enacting IIRIRA, Congress has mandated the detention and expedited the removal of aliens, including long-term permanent resident aliens, who commit serious criminal offenses while in the United States. Richardson correctly points out many harsh consequences created by these new immigration laws, but those consequences are not the result of constitutional violations but are the result of political decisions made by Congress exercising its plenary power to regulate immigration.[185] As outlined

---

[185] *See, e.g.*, S.Rep. No. 104-48 at 2-6 (1995) (discussing the presence of at least "450,000 criminal aliens in the United States who are currently incarcerated or under some form of criminal justice supervision," the fact that "the Federal Bureau of Prisons confines about 22,000 criminal aliens – 25 percent of the total Federal prison population," the "confinement of criminal aliens in state and federal prisons costs . . . approximately $724,000,000

in this decision, the Supreme Court has recognized repeatedly that immigration decisions present peculiarly political issues to be decided by the executive and legislative branches. Our judicial task is not to rewrite these new immigration laws, but to apply these laws as written by Congress to the full extent permitted by the Constitution. We have done so.

Accordingly, we **REVERSE** the decision of the district court, **VACATE** the stay entered by this Court on February 23, 1998, and direct the district court to dismiss Richardson's petition for lack of subject matter jurisdiction.

REVERSED AND VACATED.

---

in 1990," that the "INS is overwhelmed by the criminal alien problem," and that "criminal aliens are . . . a growing drain on scarce criminal justice resources.").

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-04230

RALPH RICHARDSON,

Petitioner-Appellee,

versus

UNITED STATES DEPARTMENT OF IMMIGRATION AND NATURALIZATION SERVICE; JANET RENO, United States Attorney General; *ET AL.*,

Respondents-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

---

(Filed Oct. 27, 1998)

ORDER:

Appellee's motion for supplemental briefing is denied.

/s/ Frank M. Hill
UNITED STATES CIRCUIT JUDGE

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

April 2, 1998

Mr. Ira Kurzban
Kurzban Weinger & Tetzeli
2650 SW 27th Avenue
Miami, FL 33133

Re: Ralph Richardson
v. Immigration and Naturalization Service, et al.
Application No. A-713

Dear Mr. Kurzban:

The application to vacate the stay entered by the Court of Appeals for the Eleventh Circuit in the above-entitled case has been presented to Justice Kennedy who on April 2, 1998, denied the application.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Cynthia Rapp
Cynthia Rapp
Assistant Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-04230

RALPH RICHARDSON,

Petitioner-Appellee,

versus

UNITED STATES DEPARTMENT OF IMMIGRATION AND NATURALIZATION SERVICE; JANET RENO, United States Attorney General, *ET AL.*,

Respondents-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(Filed Feb. 23, 1998)

Before EDMONDSON, DUBINA and BLACK, Circuit Judges.

BY THE COURT:

Appellants' "emergency motion for stay of district court's order pending appeal" is GRANTED. The Clerk is directed to set an appropriate expedited briefing schedule. Once all briefs have been filed, the clerk is directed to set this case on the next available calendar.

Ralph RICHARDSON, Petitioner,

v.

Janet RENO, et. al., Respondents.

No. 97-3799-CIV.

United States District Court,
S.D. Florida,
Miami Division.

Feb. 13, 1998.

Ira Kurzban, Helena Tetzeli, Kurzban, Kurzban, Weinger & Tetzeli, P.A., Miami, FL, for Petitioner.

Dexter Lee, Asst. U.S. Atty., Miami, FL, for Respondent.

ORDER

EDWARD B. DAVIS, Chief Judge.

BEFORE THE COURT IS Petitioner's Amended Application for Writ of Habeas Corpus (filed December 10, 1997), and Respondents' Motion to Dismiss Petition for Writ of Habeas Corpus and Complaint for Declaratory, Injunctive and Mandamus Relief for Lack of Subject Matter Jurisdiction (filed December 5, 1997). On December 30, 1997, the Magistrate Judge issued a Report recommending that the Court grant Petitioner's application. Respondents objected.

Having independently reviewed the petition, the objections, and the record, the Court will adopt the recommendation of Magistrate Judge Bandstra; however, the Court finds that additional discussion of the case is warranted.

FACTUAL BACKGROUND

Petitioner Ralph Richardson, a lawful permanent resident of the United States, seeks an order compelling the U.S. Immigration and Naturalization Service ("INS") to provide him with a bond hearing before an Immigration Judge while the INS determines whether he is removable from the United States.

Richardson is a native and citizen of Haiti. After turning two years old in 1968, he became a lawful permanent resident of the United States. Richardson has resided continuously in this country with his wife and three children – all of whom are U.S. citizens. He and his family live in Georgia, where he owns and operates a successful cleaning service.

On October 26, 1997, Richardson and his family returned from a two-day trip to Haiti. This had been his first trip outside the country since he legally immigrated here at the age of two. The INS detained Richardson at the Miami International Airport. Upon questioning, he admitted that he had two prior convictions. This admission resulted in the INS detaining Richardson at Krome Detention Center without opportunity for release on bond while it instituted removal proceedings. The INS asserts that Richardson was detained because he was not "clearly and beyond a doubt" entitled to be admitted to the United States under Section 235(b)(2)(A) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1225(b)(2)(A). He was charged with being inadmissable under Section 212(a)(2) of the INA, 8 U.S.C. § 1182(a)(2), due to his prior conviction. He remains in Krome today.

On November 13, 1997, Richardson requested the INS to release him on bond pending removal proceedings under Section 303(b)(3) of the Transition Period Custody Rules of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("IIRIRA"). On December 4, 1997, the INS denied Richardson's request for bond, which it had interpreted as a request for parole.

While waiting for the INS bond decision, Richardson filed a Motion for Bond Pending Deportation Proceedings with the Office of the Immigration Judge at the Krome Detention Center on November 18, 1997. Six days later, the Immigration Judge denied Richardson's request for bond without conducting a hearing. In a form order, the Immigration Judge noted, without further explanation, that Richardson was an "arriving alien" pursuant to INA § 101(a)(13)(C)(v).[1]

Following that decision, Richardson filed this habeas corpus petition challenging the Immigration Judge's denial of his request for a bond hearing. Richardson argues that the Immigration Judge's decision violated his statutory and constitutional rights because of the unsupported conclusion that he was an "arriving alien" despite

---

[1] INA § 101(a)(13)(C)(v), 8 USC § 1101(a)(13)(C)(v) states that:

> [a]n alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking admission into the United States for purposes of the immigration laws unless the alien . . . (v) has committed an offense identified in section 1182(a)(2) of this title, unless for such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title; . . .

his lawful permanent resident status and the brevity of his travel to Haiti.

Respondents answer that the Court has no jurisdiction to review the Immigration Judge's decision, and also maintain that on the merits, Richardson has no statutory or constitutional right to a bond hearing.

Magistrate Judge Bandstra, in his Report and Recommendation, found that this Court has jurisdiction and that Richardson was entitled to a bond hearing. Respondents moved for reconsideration of the report and recommendation based on *In Re Collado,* Int. Dec. 3333 (BIA December 18, 1997), 1997 WL 805604. Magistrate Judge Bandstra denied this motion. Respondents also objected to the Magistrate Judge's report and recommendation.

DISCUSSION

a. Subject Matter Jurisdiction

Respondents argue that this Court does not have jurisdiction pursuant to INA § 236(e) and 242(g), and also because Petitioner has not exhausted his administrative remedies by appealing the Immigration Judge's decision to the Board of Immigration Appeals ("BIA"). The Court disagrees and finds that it has jurisdiction to hear Petitioner's Application for Writ of Habeas Corpus.

It is well established that Respondents have the burden of demonstrating that the Court lacks subject matter jurisdiction, as there is a strong presumption in favor of judicial review of administrative action. *See, e.g., McNary v. Haitian Refugee Ctr., Inc.,* 498 U.S. 479, 111 S.Ct. 888, 112 L.Ed.2d 1005 (1991). Respondents must demonstrate,

therefore, "by clear and convincing evidence" that the recently enacted immigration legislation strips this Court of jurisdiction. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). Respondents have not done so.

Respondents rely on INA § 236(e) and INA § 242(g). Section 236(e) states that

> [t]he Attorney General's discretionary judgment required in the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

Section 242(9) provides that

> [e]xcept as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Chapter.

The Supreme Court recently held that "the congressional intent to repeal habeas jurisdiction must be express," and that "[r]epeals by implication are not favored." *Felker v. Turpin*, 518 U.S. 651, 116 S.Ct. 2333, 2338, 135 L.Ed.2d 827 (1996) (citations omitted). Therefore, pursuant to this "clear statement" rule, Congress cannot repeal habeas corpus jurisdiction by implication. *Id.* As the *Felker* Court acknowledged, Congress knows how to repeal habeas jurisdiction. Where it intends to do

so, it states that intention expressly. *Id.* "This – as Congress is doubtless aware – is the purpose of the clear statement rule: courts do not have to resort to divining phantom or unarticulated congressional intentions to repeal habeas jurisdiction where there is statutory silence." *Mojica v. Reno*, 970 F.Supp. 130, 160 (E.D.N.Y.1997).

Neither Section 236(e) nor 242(g) expressly repeals habeas jurisdiction. The statute does not even mention habeas corpus review. Whether Congress meant to imply that courts cannot review habeas petitions is not for this Court to decide. The only question is whether Section 236(e) or 242(g) expressly repeals jurisdiction over habeas corpus petitions. Review of these sections demonstrates that the answer is no.[2]

The Court also rejects Respondents' claim that it lacks jurisdiction because Petitioner failed to exhaust his administrative remedies. The exhaustion requirement is not a jurisdictional prerequisite, but rather a matter committed to the "sound discretion of the court." *See Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1032 (5th Cir.1982). There are also many exceptions to the exhaustion requirement that apply here. For example, exhaustion is not required where the agency's interpretation of a statute is

---

[2] Other District Courts have disagreed on this issue. Compare *Mayers v. Reno*, 977 F.Supp. 1457 (S.D.Fla.1997) (Moreno, J.) (holding that Congress clearly intended to divest the courts of habeas review); *Safarian v. Reno*, 968 F.Supp. 1101 (E.D.La.1997) (same) *with Tefel v. Reno*, 972 F.Supp. 608 (S.D.Fla.1997) (King, J.) (no divestment of jurisdiction); *Mojica*, 970 F.Supp. at 130 (same).

clearly at odds with its plain meaning. *See McClendon v. Jackson Television, Inc.*, 603 F.2d 1174, 1177 (5th Cir.1979). Exhaustion is also not required where there would be irreparable harm. *See Kelly v. U.S. Postal Serv.*, 492 F.Supp. 121, 127 (S.D.Ohio 1980). Finally, exhaustion is not required if it would be futile. *See American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1058 (9th Cir.1995). Because the BIA has already spoken on this issue, the result would be the same if Petitioner were to present his challenge to the BIA. While he did so, months could be lost while he sat in Krome. Therefore, the Court finds that it would be futile to require Petitioner to exhaust his administrative remedies and that he would suffer irreparable harm. Accordingly, the Court will retain jurisdiction without an administrative appeal.

b. The Merits

Respondents allege that because Petitioner is an "arriving alien," the Immigration Judge lacks jurisdiction to hear the motion for release on bond pursuant to 8 C.F.R. §§ 236.1(c)(5), (d), and 1.1(q). 8 C.F.R. § 236.1(c)(5) states that, "[a]n immigration judge may not exercise authority provided in this section and the review process described in paragraph (d) of this section shall not apply with respect to: (i) Arriving aliens, as described in section 1.1(q) . . . " 8 C.F.R. § 1.1(q) provides, "The term 'arriving alien' means an alien who seeks admission to . . . the United States." While the term "arriving alien" is not defined more specifically in the statute, a different section of the INA provides that

> [a]n alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking admission into the United States for purposes of the immigration laws unless the alien . . . (v) has committed an offense identified in section 1182(a)(2) of this title, unless for such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title; . . .

INA § 101(a)(13)(C)(v), 8 U.S.C. § 1101(a)(13)(C)(v).

Petitioner contends that INA § 101(a)(13)(C) merely codifies the doctrine enunciated by the Supreme Court over thirty years ago in *Rosenberg v. Fleuti*, 374 U.S. 449, 83 S.Ct. 1804, 10 L.Ed.2d 1000 (1963). In *Fleuti*, the Supreme Court found that a lawful permanent resident alien who leaves the United States for a "brief, casual and innocent departure" is not considered upon his return to be making an "entry" into the United States for immigration purposes. Therefore, the alien is not subject to exclusion on grounds that existed prior to his departure from this country. *Id.* At no point in these proceedings has INS established or even attempted to establish that Petitioner's departure abroad was anything other than brief, casual or innocent.

Respondents, however, rely on a recent BIA decision finding that a returning lawful permanent resident who committed an offense described in INA § 212(a)(2), is to be considered an alien seeking admission, *without regard* to the nature and circumstances of the alien's departure. *In Re Collado*, Int. Dec. 3333 (BIA Dec. 18, 1997), 1997 WL 805604. The BIA determined that 101(a)(13)(C) compelled a finding that a lawful permanent resident who fell within one of the six categories enumerated in Section

101(a)(13)(C)(i)-(vi)[3] should be regarded as seeking an admission into the United States, despite his lawful permanent resident status. *Id.* Accordingly, the BIA held that *Fleuti* does not survive the IIRIRA, and that the Immigration Judge is not to consider whether the departure from the United States was "brief, casual, and innocent" under the *Fleuti* doctrine.

The Court must determine what weight to give to the BIA decision. The deference due to an administrative interpretation of the laws involves a dual inquiry. *See Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as

---

[3] These six categories include aliens that:

> (i) ha[ve] abandoned or relinquished [permanent resident] status, (ii) ha[ve] been absent from the United States for a continuous period in excess of 180 days, (iii) ha[ve] engage [sic] in illegal activity after having departed the United States, (iv) ha[ve] departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this Act and extradition proceedings, (v) ha[ve] committed an offense identified in section 212(a)(2), unless since such offense the alien has been granted relief under section 212(h) or 240(a), or (vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

INA Section 101(a)(13)(C)(i)-(vi).

> the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the Court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. 467 U.S. at 842-43. The *Chevron* Court recognized that "[t]he judiciary is the final authority on issues of statutory construction. . . . " *Id.* at 843 n. 9.

The BIA interpretation of INA § 101(a)(13)(C) does violence to the plain meaning of that section. Section 101(a)(13)(C) simply specifies which returning lawful permanent residents *may not* be regarded as "seeking admission." It does not provide a statutory bright line for determining which returning lawful permanent residents *shall* be considered to be "seeking admission." If Congress had intended that a returning lawful permanent resident *shall* be regarded as "seeking admission" when one of the six categories applied, it certainly would have said so.[4] Instead, Congress stated six exceptions to the bright line rule that an alien lawfully admitted for permanent residence in the United States shall not be regarded

---

[4] For example, Congress could have easily stated that an alien lawfully admitted for permanent resident status in the United States shall not be regarded as seeking admission into the United States for purposes of the immigration laws; but if the alien has committed an offense in section 212(a) such alien *shall* be regarded as seeking admission.

as seeking admission. If one of the exceptions applies, the Immigration Judge should do as she always did: determine if the alien's stay was brief, casual, and innocent.

It is also clear that Congress in enacting INA § 101(a)(13)(C) did not intent [sic] to overturn the *Fleuti* doctrine. Congress must be presumed to be aware of existing law when it amends or enacts a statute. *See McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 481, 111 S.Ct. 888, 112 L.Ed.2d 1005 (1991). Thus, when Congress enacted INA § 101(a)(13)(C), it was presumably aware of the *Fleuti* doctrine, and yet it did not expressly reverse or repeal that doctrine. Section 101(a)(13)(C) simply provides that a lawful permanent resident of the United States shall not be regarded as seeking admission when none of the six conditions apply. If one or more of the conditions do apply, then the statute authorizes but does not require a finding that the alien is seeking admission. Application of those conditions is up to the Immigration Judge in removal proceedings at which time the alien and the INS can argue factors relevant under *Fleuti*.

Any other interpretation would lead to absurd and harsh results. *See Fleuti*, 374 U.S. at 449. In *Fleuti*, the Court cited numerous examples demonstrating that Congress could not have intended to exclude permanent residents merely because they step across the international border and return to the United States in a few hours. *Id.* at 461. For example, the Court cited an opinion by Judge Learned Hand where an alien took an overnight sleeper from Buffalo to Detroit on a route through Canada. *Id.* at 454 (citing *Di Pasquale v. Karnuth*, 158 F.2d 878 (2d Cir.1947)). Judge Hand held that it would be too harsh a result to find that the alien was re-entering the country.

"Were it otherwise, the alien would be subjected without means of protecting himself to the forfeiture of privileges which may be, and often are, of the most grave importance to him." *Fleuti*, 374 U.S. at 454 (citing *Karnuth*, 158 F.2d at 879). The Court warned that the statute should not be "woodenly construed" because so much was at stake for the permanent resident. *See Fleuti*, 374 U.S. at 460. "Certainly when an alien . . . who has entered the country lawfully and has acquired a residence here steps across a border and, in effect, steps right back, subjecting him to exclusion . . . seems to be placing him at the mercy of the 'sport of chance' and the 'meaningless and irrational hazards' to which Judge Hand alluded." *Fleuti*, 374 U.S. at 460 (citing *Karnuth*, 158 F.2d at 879).

The fact that the *Fleuti* doctrine originated in the course of interpreting a statute in which the terminology was "seeking to enter," or "making an entry," rather than "seeking to be admitted," is of no consequence. The same principles of statutory construction apply, and the spirit of the *Fleuti* doctrine still applies.

Legislative history also demonstrates that Congress did not intend to overturn *Fleuti*. The BIA concluded that *Fleuti* did not survive INA § 101(a)(13)(C) in part because "Congress has now amended the law to expressly preserve some, but not all, of the *Fleuti* doctrine, as that doctrine developed following the Supreme Court's 1963 decision." *See In Re Collado* at *4 (citing H.R.2202 No. 104-469, Pt. 1, at 225-26 (1996)). Congress, however, only intended to overturn "*certain interpretations* of *Fleuti* by stating that a returning lawful permanent resident alien is seeking admission if the alien is attempting to enter or has entered the United States without inspection and

authorization by an immigration officer."[5] *See* H.R.2202 No. 104-469, Pt. 1, at 226 (emphasis added). Here, Congress was concerned about aliens entering surreptitiously – without inspection by an INS officer. Therefore, INA § 101(a)(13) expressly provides that an individual who enters at a location other than one designated by INS is to be treated as an alien "seeking admission." No where does Congress indicate that it intended to overrule the central holding of *Fleuti* which is at issue here.

It is evident from the plain meaning of the statute, the legislative history, and the important policy concerns that animated the Court in 1963 that *Fleuti* is still good law.[6] Accordingly, it is

ORDERED AND ADJUDGED that the petition for writ of habeas corpus is GRANTED and that Respondent's Motion to Dismiss is DENIED. This case is REMANDED TO THE INS for proceedings consistent with the above Order. Specifically, the Court finds that Petitioner is entitled to an individualized hearing within eleven (11) days from the date stamped on this Order, at which time the Immigration Judge should determine whether Petitioner is an arriving alien, and if not, whether and under what conditions Petitioner may be

---

[5] The ultimately enacted definition in section 101(a)(13)(C) of the present law has its origins in earlier House bills. *See* H.R. 2202, 104th Cong. § 301 (1996). The ultimate language enacted by the IIRIRA is largely identical to the language in section 301(A) of H.R.2202.

[6] As in *Fleuti*, this Court's decision is based on principles of statutory construction; therefore, the Court did not reach the constitutional issues raised by Petitioner. *See Fleuti*, 374 U.S. at 457.

released from custody pending the completion of deportation proceedings.

This case is CLOSED. All pending motions not otherwise ruled upon are DENIED AS MOOT. This Court retains jurisdiction over attorneys' fees and costs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 97-3799-CIV-DAVIS

RALPH RICHARDSON,

Petitioner,

vs.

JANET RENO, Attorney General of the United States; DORIS MEISSNER, Commissioner, Immigration and Naturalization Service; ROBERT WALLIS, Acting District Director, Immigration and Naturalization Service; UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE; UNITED STATES DEPARTMENT OF JUSTICE; and THE EXECUTIVE OFFICE OF IMMIGRATION REVIEW,

Respondents.
_____/

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on Petitioner's Amended Application for Writ of Habeas Corpus filed on December 10, 1997; and Respondents' Motion to Dismiss Petition for Writ of Habeas Corpus and Complaint for Declaratory, Injunctive and Mandamus Relief for Lack of Subject Matter Jurisdiction filed on December 5, 1997. On November 29, 1997, these proceedings were referred to the undersigned by the Honorable Edward B. Davis, Chief United States District Judge, pursuant to 28 U.S.C.

§ 636(b). Accordingly, this Court held hearings on December 3, 8, and 15, 1997.

Having carefully considered the pleadings, the evidence submitted by the parties, and argument of counsel, the undersigned recommends

a. that Petitioner's Amended Application for Writ of Habeas Corpus be GRANTED with a remand to the Immigration and Naturalization Service with instructions to the Immigration Judge to provide petitioner with an individualized hearing, within fourteen days of the date of an Order adopting this recommendation, for purposes explained below:

b. that Respondent's Motion to Dismiss be DENIED; and

c. that petitioner be granted leave to refile his request for attorney's fees by separate motion, within twenty (20) days of any order entered on the above, should petitioner be entitled to seek such fees.

INTRODUCTION

This is a habeas corpus proceeding in which petitioner, Ralph Richardson, a lawful permanent resident of the United States, seeks an order compelling respondents, including the United States Immigration and Naturalization Service ("INS"), to provide him with a bond hearing before a United States Immigration Judge pending a determination by the INS of his removability from the United States.

Petitioner is a native and citizen of Haiti. In or about 1968, petitioner became a lawful permanent resident of

the United States. Between 1968 and the present, petitioner has resided continuously in the United States with his wife and three children – all of whom are citizens of the United States. Petitioner maintains, and respondents do not dispute, that petitioner and his family permanently reside in Georgia where petitioner owns and operates a successful professional cleaning service. Respondents assert, and petitioner does not dispute, that petitioner was convicted of a narcotics-related felony in 1991 and served three years of a five year sentence. Petitioner was also previously convicted for carrying a concealed firearm in 1984.

On October 26, 1997, petitioner returned from a brief two-day trip to Haiti with his family and was detained by the INS upon inspection at the Miami International Airport. Upon questioning, petitioner admitted his prior criminal convictions which resulted in his detention at the Krome Detention Center without opportunity for release on bond pending removal proceedings. The INS asserts that petitioner was detained because he was not "clearly and beyond a doubt" entitled to be admitted to the United States pursuant to section 235(b)(2)(A) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1225(b)(2)(A). Petitioner was charged with being inadmissable due to his prior narcotics conviction under section 212(a)(2) of the INA, 8 U.S.C. § 1182(a)(2), and he currently awaits removal proceedings.

On November 13, 1997, petitioner, through counsel, submitted a bond request to the INS seeking his release on bond pending removal proceedings pursuant to section 303(b)(3) of the Transition Period Custody Rules of

the Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("IIRIRA"). On December 4, 1997, petitioner's request for release on bond, interpreted by the INS as a request for parole, was denied by correspondence directed to petitioner's attorney.

Meanwhile, petitioner, on November 18, 1997, filed a Motion for Bond Pending Deportation Proceedings with the Office of the Immigration Judge at the Krome Detention Center. On November 24, 1997, the Immigration Judge denied petitioner's request for bond without conducting a hearing noting in a form Order that petitioner was an "arriving alien" without further explanation.[1]

Following that decision, petitioner filed the instant habeas corpus petition in this Court challenging the denial of his request for a bond hearing by the immigration judge. Petitioner essentially contends that his statutory and constitutional rights were violated by the Immigration Judge's decision to deny him consideration for release on bond merely on the unsupported conclusion that he was an "arrivng alien" – despite his lawful permanent residency in the United States and the brevity of his travel to Haiti.

Respondents oppose petitioner's right to a bond hearing before an Immigration Judge; and contend that this Court has no jurisdiction to review the Immigration

---

[1] The Immigration Judge apparently made reference to petitioner as an "arriving alien" as that phrase is used in INA § 101(a)(13)(C) which is set forth and discussed below.

Judge's decision to deny petitioner's bond request pending deportation proceedings.[2]

ANALYSIS

A. Jurisdiction

The threshold issue here is whether this Court has subject matter jurisdiction to decide the substantive issues raised in this petition. Respondents essentially contend that this Court lacks subject matter jurisdiction because (a) INA § 236(e) divests this Court of jurisdiction; (b) INA § 242(g) does the same; and (c) petitioner has not exhausted his administrative remedies by appealing the Immigration Judge's decision to the Board of Immigration Appeals ("BIA").

1. INA Section 236(e)

Respondents first rely on INA § 236(e), 8 U.S.C. § 1226(e), which provides that:

> The Attorney General's discretionary judgment required in the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

---

[2] Both petitioner and respondents agree that the final deportation proceeding, even if conducted soon, will not resolve this petition because of the likely appeal by the losing party in that proceeding which could take several months to resolve by appeal through INS administrative procedures.

Respondents argue that this provision encompasses not only the discretionary decisions by the Attorney General but also those of the Immigration Judge regarding the "detention or release of any alien or the . . . denial of bond . . . " so that this Court lacks jurisdiction to review or set aside that decision.

Reviewing § 236(e) and relevant law, the undersigned rejects respondents' position. In so doing, this Court first recognizes well-established law establishing that respondents have the burden of demonstrating this Court lacks subject matter jurisdiction despite the strong presumption in favor or [sic] judicial review of administrative action including action by the INS. *See, e.g., McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986). Thus, respondents must demonstrate "by clear and convincing evidence" that Congress intended to deprive this Court of habeas corpus jurisdiction in the recently enacted immigration statute. Respondents offer no such evidence here other than the statute itself. The entire statute, however, is devoid of any language restricting habeas corpus review.

Moreover, INA § 236(e) specifically refers to discretionary judgments and decisions of the Attorney General with respect to detention or release of aliens. Here, the record is clear that the decision to deny bond consideration to petitioner was a non-discretionary decision by the Immigration Judge without any apparent involvement by the Attorney General herself. While respondents argue that the statute should be interpreted to include lower level employees of the Department of Justice, this Court has rejected that argument in at least one prior

case. In *Tefel v. Reno*, 972 F.Supp. 608 (S.D. Fla. 1997) (J. King, presiding), this Court analyzed a similar provision of the same statute, INA § 242(g), which expressly provides that:

> No court shall have jurisdiction to hear any cause or claim . . . arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders. . . .

Applying basic principles of statutory construction, the Court found that the plain and express statutory language of this statutory provision only precluded judicial review of a direct decision or action of the "Attorney General." The INA specifically defines the Attorney General as "the Attorney General of the United States and no one else." INA § 101(a)(5). Therefore, the Court in *Tefel* refused to extend the statute beyond its clear and unambiguous terms.

Finally, the undersigned finds that INA § 236(e) does not apply to deprive this Court of jurisdiction, even if extended beyond the Attorney General, because the Immigration Judge's decision challenged by this petition was not a "discretionary" decision at all regarding petitioner's release on bond. The statute bars review of discretionary decisions only, not review of questions of law as those raised here by the Immigration Judge's legal conclusion that he lacked jurisdiction to grant petitioner a bond hearing. Thus, the undersigned concludes that INA § 236(e) does not divest this Court of subject matter jurisdiction in this case.

2. INA § 242(g).

Respondents' second jurisdictional argument is premised on INA § 242(g) which provides as follows:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Chapter.

In a recently decided case in this district, this very Court rejected the same argument as made by respondents here. In *Rodriguez v. Wallis*, Case No. 96-3518-Civ-Davis (S.D.Fla. Jan. 29, 1997), the INS argued that a petition for writ of habeas corpus filed by an alien seeking release pending appeal by the INS of a deportation decision was barred by INA § 242(g) as the habeas petition arose from the defendant's action to commence deportation proceedings against him. However, this Court in *Rodriguez* found that § 242(g) on its face was specifically limited to three types of decisions or actions by the Attorney General; to "commence proceedings, adjudicate cases, or execute removal orders" and none of these actions involved decisions as to a grant or denial of bond in removal proceedings. *Id.* at pg. 4. This court in *Rodriguez*, therefore, held that INA § 242(g) does not apply to deprive a district court of jurisdiction over a habeas petition that challenged the unlawful nature of an alien's continued and indefinitely [sic] detention by the INS. That same conclusion applies here so that INA § 242(g) does not divest this Court of jurisdiction over this petition.

3. Exhaustion of Administrative Remedies

Finally, the undersigned rejects respondents' argument that this Court lacks jurisdiction because petitioner has failed to exhaust his administrative remedies available through appeal to the BIA. The exhaustion requirement is not a jurisdictional prerequisite, but rather a matter committed to the "sound discretion of the court." *See Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1032 (5th Cir. 1980). Also, there are many exceptions to the exhaustion requirement which are applicable here. First, neither the Immigration Judge nor the BIA is authorized to determine constitutional issues. When an administrative agency cannot determine constitutional issues, administrative remedies and review need not be exhausted. *See Mathews v. Eldridge*, 424 U.S. 319 (1976); *Rafeedie v. INS*, 880 F.2d 506 (D.C.Cir. 1989). Even where no constitutional issues must be decided, exhaustion of administrative remedies is not required where the agency's interpretation is clearly at odds with a statute – as asserted here. *McClendon v. Jackson Television, Inc.*, 603 F.2d 1174, 1177 (5th Cir. 1979). Exhaustion is also not required where there would be irreparable harm – as asserted here. *Kelly v. United States Postal Service*, 492 F.Supp. 121, 127 (S.D. Ohio 1980). Moreover, exhaustion of administrative remedies is not required if an alien seeks relief not inconsistent with an Order of deportation, *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968), or where a petitioner challenges the conditions of bond. *National's* [sic] *Center for Immigrants' Rights v. INS*, 791 F.2d 1351, 1354 (9th Cir. 1986), *vacated on other grounds*, 481 U.S. 1009 (1987). Finally, exhaustion is not required if it would be futile. *American-Arab Anti-Discrimination Committee v.*

Reno, 70 F.3d 1045, 1058 (9th Cir. 1995). Here, there is no reason to believe that the result would be different if petitioner were to present his next challenge to the BIA and months could be lost in the process. Under these circumstances, the undersigned finds that this Court has jurisdiction to consider this petition even without an administrative appeal.

B. The Merits

Respondents essentially alleged that petitioner is an "arriving alien" so that the Immigration Judge automatically lacks jurisdiction to hear his motion for release on bond under 8 CFR §§ 236.1(c)(5), 236.1(d) and 1.1(q). 8 CFR § 236.1(c)(5) provides in relevant part that:

> An immigration judge may not exercise authority provided in this section and the review process described in paragraph (d) of this section shall not apply with respect to:
>
> (i) Arriving aliens, as described in section 1.1(q) . . .

8 CFR § 1.1(q) provides in relevant part as follows:

> The term "arriving alien" means an alien who seeks admission to . . . the United States.

While the term "arriving alien" is not defined any more specifically in the statute, INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C), provides in relevant part as follows:

> An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking admission into the United States for purposes of the immigration laws unless the alien . . . (v) has committed an offense identified in section 1182(a)(2) of this title, unless for such

> offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title; . . .

Petitioner contends, and the undersigned agrees, that INA § 101(a)(13)(C) merely codifies the *Fleuti* doctrine first enunciated by the Supreme Court over thirty years ago in *Rosenberg v. Fleuti*, 374 U.S. 449 (1964). In *Fleuti*, the Supreme Court found that a lawful permanent resident alien who leaves the United States for a brief, casual and innocent departure, is not considered upon his return, to be making an "entry" into the United States for immigration purposes; and is, therefore, not subject to exclusion on grounds that existed prior to his departure from the country. The *Fleuti* doctrine has been reaffirmed by the Supreme Court repeatedly and uniformly followed by lower federal courts over the following many years. *See, e.g., Landon v. Plascencia*, 459 U.S. 21 (1982); *Jubilado v. INS*, 819 F.2d 210 (9th Cir. 1987); *Yanez-Jacques v. INS*, 440 F.2d 701 (5th Cir. 1971).

In this case, the INS did not establish that petitioner's departure to Haiti with his family was anything other than a brief, casual and innocent trip abroad. It is uncontested that this was only a two-day trip to his home country; and that no crime was committed by petitioner while outside this country. Neither *Fleuti* nor any of its progeny have held that a lawful permanent residence [sic] who departs the United States for a legitimate reason for a brief period of time is to be treated as "an arriving alien" simply because of a crime committed years before the departure. Generally, Congress must be presumed to be aware of existing law when it amends or enacts a statute. *McNary, supra*, 498 U.S. at 481. Thus, when Congress enacted INA § 101(a)(13)(C), it was presumably

aware of the *Fleuti* doctrine, and yet did not expressly reverse or repeal that doctrine in enacting INA § 101(a)(13)(C). This statute simply provides that a lawful permanent residence [sic] of the United States shall not be regarded as seeking admission when none of six conditions apply. If one or more of the conditions do apply, then the statute authorizes but does not require a finding if the alien is seeking admission as an "arriving alien." That decision is left to the immigration judge in removal proceedings at which time the alien and the INS can argue factors considered relevant under the *Fleuti* decision. Unfortunately, no such hearing was conducted by the Immigration Judge here prior to his concluding that petitioner was an "arriving alien" not entitled to bond consideration prior to deportation proceedings.

While INA § 101(a)(13)(C) has received little reported judicial discussion, at least one immigration court in another district has found this to be a reasonable and logical interpretation of the statute. *See In the Matter of Wesley Adams,* File No. A30-790-313 (July 25, 1997). In *Edwards,* an immigration judge found that the IIRIRA amendments to the INA, included in INA § 101(a)(13)(C), codified *Fleuti* so that an individual found to meet any of the six conditions of the statute permitted but did not require the immigration judge to conclude that he or she was seeking admission as an "arriving alien" to the United States. At that point, the immigration judge must determine, in employing the former *Fleuti* doctrine and other criteria, whether a person who meets any of the exceptions of INA § 101(a)(13)(C) is in fact seeking admission, and is therefore an arriving alien, or whether that person has already been admitted to the United

States. *Edwards* at 10-11. The immigration judge when making that decision should consider the seriousness of the conviction, when the conviction occurred, whether or not the INS considered the criminal charges serious enough to initiate deportation proceedings against the individual prior to his departure from the county [sic] and any other relevant factors. *Edwards* at 11. Again, petitioner received no such consideration here. Rather, the Immigration Judge seemingly concluded without a hearing that petitioner was an "arriving alien" simply on the basis of his criminal conviction several years ago. In so doing, the Immigration Judge made an arbitrary and capricious decision that cannot be sustained without further administrative review.

SUMMARY

For all of the foregoing reasons, the undersigned recommends that Petitioner's Petition for Habeas Corpus Relief be GRANTED with a remand to the INS for proceedings consistent with the above. Specifically, this Court finds that petitioner is entitled to an individualized hearing, within 14 days of any order adopting this recommendation, at which time the immigration judge should considered [sic] whether petitioner is an arriving alien, and if not, whether and under what conditions petitioner may be released from custody pending the completion of deportation proceedings. In so recommending, the undersigned finds it appropriate that the decision with respect to petitioner's classification as an "arriving alien" be made by the Immigration Judge following the required hearing with appeal to the BIA.

IT IS FURTHER RECOMMENDED, consistent with the above, that Respondent's Motion to Dismiss this Habeas Corpus Proceeding be DENIED; and that petitioner's request for attorney's fees be incorporated in a separately filed motion should such be warranted by an Order of this Court with respect to this Report and Recommendation.

The parties may serve and file written objections to this Report and Recommendation with the Honorable Edward B. Davis, Chief United States District Judge, within ten (10) days of receipt. *See* 28 U.S.C. § 636(b)(1)(C); *United States v. Warren*, 687 F.2d 347 (11th Cir. 1982), *cert. denied*, 460 U.S. 1087 (1983); *Hardin v. Wainwright*, 678 F.2d 589 (5th Cir. Unit B 1982); *see also Thomas v. Arn*, 474 U.S. 140 (1985).

RESPECTFULLY SUBMITTED at Miami, Florida this 30th day of December, 1997.

/s/ Ted E. Bandstra
Ted E. Bandstra
United States
Magistrate Judge

Copies furnished to:
All counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 97-3799-CIV-DAVIS

Magistrate Judge Bandstra

RALPH RICHARDSON,

Petitioner/Plaintiff,

vs.

JANET RENO, Attorney General of the United States; DORIS MEISSNER, Commissioner, Immigration and Naturalization Service; ROBERT WALLIS, Acting District Director, Immigration and Naturalization Service, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE; UNITED STATES DEPARTMENT OF JUSTICE; and THE EXECUTIVE OFFICE OF IMMIGRATION REVIEW

Respondents/Defendants.
_____/

AMENDED APPLICATION FOR WRIT OF HABEAS CORPUS

The Petitioner/Plaintiff, RALPH RICHARDSON, sues the Respondent/Defendants, JANET RENO, Attorney General of the United States; DORIS MEISSNER, Commissioner, Immigration and Naturalization Service; ROBERT WALLIS, Acting District Director, Immigration and Naturalization Service; UNITED STATES DEPARTMENT OF JUSTICE; and the UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE and alleges as follows:

PRELIMINARY STATEMENT

1. This Petition for Writ of Habeas Corpus is brought by RALPH RICHARDSON, a lawful permanent resident of the United States, who makes his home in Georgia. Mr. RICHARDSON has been a lawful permanent resident of the United States since approximately 1968, since he was two years old. He has a six year old daughter and an eleven year old daughter who are U.S. Citizens by birth. He also has a nine year old step-son who is a U.S. citizen. His wife, Janice Richardson, is also a U.S. Citizen by birth. Mr. Richardson has four sisters who are U.S. Citizens. His mother and brother are lawful permanent residents of the United States, and they will also soon be U.S. Citizens. Mr. Richardson has no immediate family left in Haiti.

2. On October 26, 1997, when Mr. RICHARDSON was reentering the United States from a two day vacation to Haiti with his family, he was stopped by IMMIGRATION AND NATURALIZATION SERVICE (hereinafter "INS") officers at the Miami International Airport. He was thereupon arrested by the INS, taken to the Krome Detention Center, and put in "removal" proceedings based on the INS's allegation of a single 1991 drug related conviction. He is being held in detention at the Krome Detention Center by the Defendants.

3. As a lawful permanent resident reentering the United States, Mr. RICHARDSON is entitled to due process and the concomitant right to a hearing on his request for release, if necessary on bond, pending removal proceedings. When Mr. Richardson returned from a two day, brief and casual trip abroad, he was improperly deemed

an "arriving alien" as opposed to being deemed a previously "lawfully admitted" returning resident alien.

4. Under the Transition Period Custody Rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, section 303(b)(3), Mr. Richardson is eligible to obtain a bond.[1] Mr. Richardson is a lawful permanent resident with strong family ties to this country who has no past record of any violent crimes, is not a flight risk and poses no threat to persons or property.

5. Notwithstanding the law, MR. RICHARDSON is being incarcerated without bond for what may be a period of many months. The INS had failed to grant or deny his request for release conditioned upon payment of a reasonable bond, pending proceedings in his case. On November 24, 1997, Mr. Richardson sought an immigration bond from the Immigration Judge at Krome.

6. This action challenges the decision of the Defendants to deny Mr. RICHARDSON a hearing on the merits of his request for release on bond on the grounds that his indefinite incarceration, without even a hearing on his release pending proceedings, violates his due process rights under the Fifth Amendment, the Equal Protection Guarantees of the Fifth Amendment, the Eighth Amendment, Section 236 of the Immigration Nationality Act, and INS regulations and other relevant law.

---

[1] The Transition Period Custody Rules entitle Mr. Richardson to bond "provided he can demonstrate that he will not pose a danger to the safety of another person and property and is likely to appear for all scheduled proceedings." *Matter of Noble*, Int. Dec. #3301 (BIA 1997) at 2-3.

JURISDICTION

7. Jurisdiction is conferred on this Court with respect to the Petition for Writ of Habeas Corpus by 28 U.S.C. § 2241.

VENUE

8. Pursuant to 28 U.S.C. § 1391(e), venue lies in the Southern District of Florida because it is here, where the Petitioner/Plaintiff resides, where the statute and regulation was implemented, where Petitioner/Plaintiff was and is detained and therefore the cause of action arose, and where the Respondent/Defendant, ROBERT WALLIS resides.

PARTIES

9. The Petitioner/Plaintiff, RALPH RICHARDSON, is a lawful permanent resident of the United States. He lives in Georgia with his wife and children. He became a lawful permanent resident of the United States on or about 1968, pursuant to a petition filed for him by his father. He has a wife and three (3) children living in the United States, all of whom are United States citizens for whom he provides support. As a result of his incarceration without bond, Mr. RICHARDSON will be unable to meet his obligations to his children and family. As a business owner[2], a basketball coach for teenagers in his

---

[2] Mr. Richardson owns a cleaning service called, Exclusive Touch Cleaning Service, in Atlanta, Georgia. He has numerous well-established clients who have attested to Mr.

neighborhood and director of his community recreational league, his continued detention detrimentally impacts not only Mr. RICHARDSON and his U.S. Citizen family members, but it also negatively impacts other U.S. Citizens in his community to whom he has very close ties.

10. The Respondent/Defendant, JANET RENO is the Attorney General of the United States and in that capacity has final authority over the decisions, practices and procedures of the INS and its employees challenged herein. The Attorney General has delegated her authority under the INA to officials of the INS. She is sued in her official capacity.

11. The Respondent/Defendant, DORIS MEISSNER is the Commissioner of the INS and, in that capacity, is the chief executive officer of the INS. She is therefore directly responsible for the direction, conduct and actions of the officers and employees of the INS concerning the incarceration of the Petitioner/Plaintiff. Ms. MEISSNER is sued in her official capacity.

12. The Respondent/Defendant, ROBERT WALLIS is the District Director of the INS, District VI. He is the chief officer in the district responsible for maintaining the custody of the Petitioner/Plaintiff, and is otherwise responsible for implementing the statute challenged herein. Mr. WALLIS is sued in his official capacity.

RICHARDSON's reliability, honesty, professional character and integrity. Members of his community have also written letters on his behalf which emphasize the importance of his presence and his positive influence on the youths and parents in his community.

13. The Respondent/Defendant, UNITED STATES DEPARTMENT OF JUSTICE is the agency that has the oversight and primary responsibility for the INS.

14. The Respondent/Defendant, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE ("INS") is the agency directly responsible for the implementation and application to the Petitioner/Plaintiff of the statute challenged herein.

15. The Respondent/Defendant, EXECUTIVE OFFICE OF IMMIGRATION REVIEW ("EOIR") is a division of the Department of Justice, and is responsible for supervision and administration of the Office of the Immigration Judge.

FACTUAL BACKGROUND

16. On or about 1968, the Petitioner/Plaintiff became a lawful permanent resident of the United States.

17. On October 26, 1997, upon a return trip into the United States, Mr. RICHARDSON was stopped by the IMMIGRATION AND NATURALIZATION SERVICE. Mr. RICHARDSON had been briefly out of the United States for two days with his family on a legitimate vacation, and was returning to resume his residency in this country. Mr. RICHARDSON had never been back to Haiti since he first entered the U.S. as an infant.

18. The INS placed Mr. Richardson in removal (exclusion/deportation) proceedings based on its allegation of a single 1991 drug related conviction.

19. On November 13, 1997, Mr. Richardson submitted a bond request to the IMMIGRATION AND NATURALIZATION SERVICE seeking his release on bond pending removal proceedings. A copy of that request is attached hereto as Exhibit "A" and includes substantial proof of Mr. RICHARDSON's eligibility for bond in accordance with the Transition Period Custody Rules of the Illegal Immigration Reform and Immigration Responsibility Act of 1996, section 303(b)(3). To date, the IMMIGRATION AND NATURALIZATION SERVICE has not denied or granted that bond request.

20. While the Petitioner's/Plaintiff's application for release on bond was pending with the District Director, he requested a bond hearing with the Immigration Judge at Krome. Exhibit "B". The Immigration Judge is an agent, employee and/or representation of Defendant EOIR, and at all times material hereto was acting within his authority as such.

21. On November 24, 1997, the Immigration Judge declined to hear the Petitioner's/Plaintiff's Motion solely on the basis of the Immigration and Naturalization Service's argument that he was deprived of jurisdiction, because Mr. Richardson, a green card holder with thirty years of residence in this country, who left for a two day trip to Haiti, was an "arriving alien". The INS argued that arriving aliens are not entitled to a bond hearing before an Immigration Judge based on 8 C.F.R. §§ 236.1(c)(5), 236.1(d), 1.1(q) and INA § 101(a)(13)(C). See Exhibit "C".

22. By its express terms, 8 C.F.R. § 236.1 only restricts the Immigration Judge's jurisdiction over *appeals* of bond denials by the Immigration and Naturalization

Service. Mr. Richardson did not seek the Immigration Judge's review of any denial, as INS did not deny his bond request; it has simply failed to act on it and has refused to advise Mr. Richardson of when it will decide his request. Mr. Richardson, therefore, requested the Immigration Judge to determine a reasonable bond for his release.

23. The Service contends that the Immigration Judge was deprived of jurisdiction to hear the Petitioner's/Plaintiff's request for bond pursuant to 8 C.F.R. 236.1(c)(5) because of his alleged status as an "arriving alien".[3] The Service based its argument on its broad and

---

[3] 8 C.F.R. § 236.1(c)(5) provides in relevant part:

> An immigration judge may not exercise authority provided in this section and the review process described in paragraph (d) of this section shall not apply with respect to: (I) Arriving aliens, as described in § 1.1(q) of this chapter, including aliens paroled pursuant to section 212(d)(5) of the Act, in removal proceedings . . .

8 C.F.R. § 1.1(q) provides in relevant part:

> The term arriving alien means an alien who seeks admission to or transit through the United States, as provided in 8 C.F.R. part 235 [INSPECTION OF PERSONS APPLYING FOR ADMISSION]

8 C.F.R. 236.1(d) provides in relevant part:

> *Appeals from custody decisions.*
>
> *(1) Application to immigration judge.*
>
> After an initial custody determination by the district director, including the setting of a bond, the respondent may, at any time before an order under 8 C.F.R. part 240 becomes final, request amelioration of the conditions under which he or she may be

erroneous interpretation of INA § 101(a)(2)(13)(C)(v) and 8 C.F.R. § 236.1, which, the Service contends, in defining the term "admission" and "admitted" treats certain lawful permanent residents returning to the United States as seeking admission to the United States, including where the lawful permanent resident has, at any time, committed an offense identified in section 212(a)(2), unless since such offense the alien has been granted 212(h) or 240(A) relief. Thus, pursuant to 8 C.F.R. §§ 236.1(c)(5) and 236.1(d), in combination with § 101(a)(13)(C)(v), the Immigration Judge mistakenly and unconstitutionally construed the regulations as stripping him of jurisdiction over bond requests by lawful permanent residents detained at a port of entry with certain convictions, from release, while allowing aliens detained within the United States with the same types of convictions to seek such relief from the immigration judge.

COUNT I

Equal Protection Violation

24. The Petitioner/Plaintiff realleges and incorporates herein as if set forth fully and at length paragraphs 1 through 23.

25. The INS and the Immigration Judge's interpretation of 8 C.F.R. §§ 236.1(c)(5), 36.1(d), 1.1(q) and INA

---

released. Prior to such final order, and except as otherwise provided in this chapter, the immigration judge is authorized to exercise the authority in section 236 of the Act to detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may be released. . . .

§ 101(a)(13)(C) in the present case violates the Equal Protection clause by depriving the Immigration Court of jurisdiction to hear and decide bond requests for certain lawful permanent residents returning to the United States, while conferring jurisdiction on the Immigration Judge to hear bond proceedings for similarly situated individuals who have not left the United States. The INS's and the Immigration Judge's interpretation and application of the law in this manner, impermissibly establishes a class of lawful permanent residents who are subject to incarceration without the opportunity to obtain a bond hearing before an immigration judge. At the same time, this interpretation permits an immigration judge to hear bond motions and to grant bond to persons who did not depart the U.S. (even those who are not lawful permanent residents), and who may pose a greater threat to society or be more likely to abscond. The treatment of lawful permanent residents under this statute in a manner different than the treatment of other aliens who may pose a greater risk and who may have few or no ties to this country, creates an irrational and impermissible distinction that discriminates against persons such as Mr. RICHARDSON in violation of the Equal Protection Guarantee of the Fifth Amendment to the United States Constitution.

26. The immigration judge's ruling violated the petitioner's right to equal protection and due process and also conflicts with Congressional policy as expressed in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996) (IIRIRA). On April 1, 1997, the removal provisions of IIRIRA went into effect. Accordingly, as of April 1, 1997, pursuant to IIRIRA, there is no longer any

distinction between exclusion and deportation proceedings; rather the immigration laws were simplified by combining the two proceedings to provide instead one form of removal proceedings. Pursuant to these changes, no differences exist between persons attempting to re-enter the country and those already present in the United States with regard to the rights and remedies of lawful permanent residents in removal proceedings. Notwithstanding the government's clear intention to unify the laws and procedures formerly bifurcated into exclusion and deportation proceedings, the government has improperly reinstituted, in a few select and convenient provisions, (such as that presented in this case) the distinction between persons attempting to re-enter the country and those already present in the United States.[4]

27. By carving out those instances where it would be particularly convenient for the government to maintain the distinction[5] not otherwise embodied in "removal" proceedings, the government has promulgated

---

[4] Moreover, in the process, Congress conferred upon the Immigration and Nationality Service the role of police, judge and jury under these circumstances.

[5] *See Leng May Ma v. Barber*, 78 S.Ct. 1072, which discusses at length the former policy of distinguishing between "seeking entry" and being "within the United States" for purposes of ascertaining legal benefits enjoyed by an alien pending determination of his admissibility. Under IIRIRA, the definition of entry is no longer a relevant term as the former distinction between exclusion proceedings and deportation was abolished with the introduction of removal proceedings. Accordingly, it is improper for the government to continue to act as if the former policy is still in effect, contrary to Congressional mandate.

statutory and regulatory provisions which are unconstitutional on their face and as applied because they create a situation in which disparate treatment exists between lawful permanent residents who are returning from abroad to unrelinquished residencies and lawful permanent residents who are present in the United States.

28. 8 C.F.R. §§ 236.1(c)(5), 236.1(d), 1.1(q) and INA § 101(a)(13)(C), on their face and/or upon the Defendants' application of this regulation and statute, deprive the immigration court of jurisdiction with respect to the issue of bond for individuals such as the Petitioner in removal proceedings, violate the Equal Protection clause of the Fourteenth Amendment and are unconstitutional.

COUNT II

Procedural Due Process Violation

29. The Petitioner/Plaintiff realleges and incorporates herein as if set forth fully and at length paragraphs 1 through 23.

30. On October 26, 1997, RALPH RICHARDSON, a lawful permanent resident of the United States, was incarcerated by the INS. Before a decision had been reached regarding his request for bond to the INS and because of undue delay in INS' adjudication of his bond request, he sought a bond hearing before the Immigration Judge. Although Mr. RICHARDSON could have easily demonstrated that he would not abscond and would pose no risk to society if he were released on bond pending a determination in his deportation case, the Service's and the Immigration Judge's mistaken and unconstitutional

interpretations of 8 C.F.R. §§ 236.1(c)(5), 236.1(d), 1.1(q) and INA § 101(a)(13)(C) provided no opportunity to establish suitability for bond and the Respondents/ Defendants have not and will not provide any hearing, formally or otherwise, to permit Mr. RICHARDSON to demonstrate his suitability for bond.

31. As a lawful permanent resident of the United States, Mr. RICHARDSON is entitled to the full protection of the Due Process clause of the Fifth Amendment of the United States Constitution. The Immigration Judge's and the INS interpretation of the statute and the regulations, by wholly depriving lawful permanent residents, such as Mr. RICHARDSON, of the right to present evidence concerning their suitability for bond, deprives them on its face of procedural due process under the Fifth Amendment of the United States Constitution. It also deprives Mr. RICHARDSON of due process as applied because he could easily demonstrate his suitability for bond if given the opportunity to do so.

COUNT III

Eighth Amendment Violation

32. The Petitioner/Plaintiff realleges and incorporates herein as if set forth fully and at length paragraphs 1 through 23.

33. Mr. RICHARDSON's incarceration provides for no set of conditions where he can obtain bail. He is not only incarcerated without bond and without an opportunity to have his request for bond heard by an immigration judge, his incarceration is indefinite under the terms

of the statute even if he prevails in removal proceedings. The indefinite incarceration of a lawful permanent resident without bail violates the Eighth Amendment of the United States Constitution by failing to provide for a reasonable bail, even after a lawful permanent resident prevails in his cause.

34. The Petitioner/Plaintiff's incarceration without bail prior to the determination of his deportability also violates the reasonable bail requirement of the Eighth Amendment. The statute does not grant authority to the Attorney General, or any administrative officer, to set bail under any circumstances. The refusal to set bail under any circumstance is excessive and in violation of the Eighth Amendment to the United States Constitution.

COUNT IV

Substantive Due Process Violation

35. The Petitioner/Plaintiff re-alleges and incorporates herein as if set forth fully and at length paragraphs 1 through 23.

36. As a lawful permanent resident, Mr. RICHARDSON is assured the full protection of the United States Constitution, including the Due Process Clause of the Fifth Amendment.

37. Mr. RICHARDSON's incarceration without bond and the right to a bond hearing pursuant to INA § 236 is without limitation. Mr. RICHARDSON may be incarcerated for months, and perhaps years, while his case winds its way through the courts and he establishes his entitlement to remain in the United States.

38. Basic tenets of statutory construction require 8 C.F.R. §§ 236.1(c)(5), 236.1(d), 1.1(q) and INA § 101(a)(13)(C) to be narrowly construed. The only sensible reading of 8 C.F.R. §§ 236.1(c)(5), 236.1(d), 1.1(q) and INA § 101(a)(13)(C) would not apply to lawful permanent residents. Supreme Court precedent expressly holds that a lawful permanent resident, even one seeking entry into the United States, is entitled to due process under the Fifth Amendment.

39. Further, all excludable aliens have the right under INS statutes and regulations to a fundamentally fair hearing. This principle has been specifically applied to statutes and regulations which, as in the instant case, attempt to deprive an alien of his constitutional rights to due process by virtue of the fact that he departed from the United States.

40. In this instance, Mr. Richardson's status as a lawful permanent resident dictates, pursuant to Supreme Court precedent and basic tenets of statutory construction, that 8 C.F.R. §§ 236.1(c)(5), 236.1(d), 1.1(q) and INA § 101(a)(13)(C) must be narrowly construed in his favor. Specifically, the plain language of 8 C.F.R. §§ 236.1(c)(5), 236.1(d), 1.1(q) makes no reference to lawful permanent residents, and INA § 101(a)(13)(C) expressly exempts lawful permanent residents with a few narrow exceptions which if applied to Mr. Richardson are both improper and unconstitutional.

41. Because the clear mandate of Supreme Court precedent firmly establishes that the interpretation given by the Immigration Judge below is both improper and

unconstitutional, the only basis for upholding the Immigration Judge's ruling would be if (1) Congress had spoken clearly and expressly on the issue, and (2) provided that there was a rational relationship between this revised statutory or regulatory provisions and a legitimate governmental interest. Neither of these prerequisites were satisfied as evidenced by three important facts. First, the regulatory provisions are silent as to application to lawful permanent residents. Second, there is no rational relationship between the Immigration Judge's interpretation of the relevant provisions and any legitimate governmental interest. Third, no such rational relationship is revealed in the related legislative history.

42. Although Mr. RICHARDSON could have easily demonstrated that he would not abscond and would pose no risk to society if he were released on bond pending a determination in his case, the Immigration Judge's and the INS's mistaken and unconstitutional interpretation of 8 C.F.R. § 236.1(c)(5), 236.1(d) and 1.1(q) provides no opportunity to establish suitability for bond. The Respondent/Defendants have not and will not provide any hearing formally or otherwise to permit Mr. RICHARDSON to demonstrate a suitability for bond.

43. Incarceration which is permanent, or at a minimum for months or years, depriving a lawful permanent resident of the United States of liberty, without the requirement of any showing to a judicial officer or even administratively that he should be incarcerated, interferes with rights implicit in the concept of ordered liberty and is shocking to the conscience. In the present case, the

denial of the right to a bond hearing before the Immigration Judge is unconstitutional as applied to Mr. RICHARDSON as a lawful permanent resident. Such a denial is in violation of substantive due process under the Due Process Clause of the Fifth Amendment.

COUNT V

8 C.F.R. §§ 236.1(c)(5) Is Ultra Vires Of The Statute

44. The Petitioner/Plaintiff re-alleges and incorporates herein as if set forth fully and at length paragraphs 1 through 23.

45. The legislative history and the plain language of the relevant provisions, makes it clear that the Immigration Judge's interpretation of 8 C.F.R. §§ 236.1(c)(5), 236.1(d), 1.1(q) and INA § 101(a)(13)(C) is ultra virus of the Immigration and Nationality Act as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996) (IIRIRA) because it is unsupported by the legislative history, it expressly conflicts with Congressional intent to abolish the legal fiction known as the "entry doctrine" and it conflicts with established Supreme Court precedent interpreting the Immigration and Nationality Act.

46. Nothing in the legislative history negates the otherwise standard tenets of statutory construction which require that the statutory and regulatory provisions at issue be narrowly construed in favor of Mr. Richardson.

COUNT VI

Upon Entry to the U.S., Petitioner/Plaintiff Was Improperly Deemed an "Arriving Alien" as Oppose To A Returning Resident Alien

47. The Petitioner/Plaintiff re-alleges and incorporates herein as if set forth fully and at length paragraphs 1 through 23.

48. The INS improperly deemed Mr. RICHARDSON as an "arriving alien", despite the fact that his two day departure from the U.S. was a brief, casual and innocent absence. By declaring Mr. RICHARDSON as a arriving alien, the INS stripped him of his right to a bond hearing before the Immigration Judge.

ATTORNEY'S FEES

49. As a result of Mr. RICHARDSON's incarceration and the actions of the Respondents/Defendants in enforcing this illegal and unconstitutional statute, Mr. RICHARDSON was required to retain counsel and to pay counsel reasonable attorney's fees. He seeks attorney's fees under the Equal Access to Justice Act and any other appropriate law for his reasonable attorney's fees in this matter.

IRREPARABLE INJURY

50. The effect of the arbitrary and capricious actions of the Defendants/Respondents and the applicability of 8 C.F.R. 236.1(c)(5), 236.1(d), 1.1(q) and INA § 101(a)(13)(C), is to deprive Mr. RICHARDSON of his liberty without due process of law in violation of the Due Process Clause

and Equal Protection Guarantees under the Fifth Amendment to the United States Constitution. The deprivation of liberty is in and of itself irreparable harm.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

51. The Plaintiff/Petitioner has no administrative remedies to exhaust. As the Defendants/Respondents regard the Plaintiff/Petitioner to be an excludable alien, there is no administrative review of the decision to incarcerate without bond. Indeed, the statute and regulations at issue also withdraw from the agency or its appellate bodies any discretion to review a bail decision. There is, therefore, no administrative procedure to exhaust.

PRAYER FOR RELIEF

WHEREFORE, Petitioner/Plaintiff prays that this Court:

a. Accept jurisdiction over this action;

b. Declare that Mr. RICHARDSON, as a lawful permanent resident, be not incarcerated and that such incarceration is unconstitutional or illegal because:

i. As a returning resident of the United States, Mr. RICHARDSON is entitled to bond pursuant to the provisions of INA § 236 and to a hearing before an Immigration Judge on the merits of his request for release pending removal proceedings.

ii. The Defendants' interpretation of INA 8 C.F.R. §§ 236.1(c)(5), 236.1(d), 1.1(q) and

INA § 101(a)(13)(C) is unconstitutional and illegal because:

(1) It violates the procedural and substantive due process protections of the Due Process Clause of the Fifth Amendment of the United States Constitution.

(2) It violates the equal protection guarantees of the Due Process Clause of the Fifth Amendment of the United States Constitution.

(3) It violates the Eighth Amendment to the United States Constitution.

(4) It violates other relevant law.

c. Issue a writ of habeas corpus requiring that Mr. RICHARDSON be released pending removal proceedings.

e. Award Petitioner/Plaintiff his Court costs and attorney's fees in this lawsuit.

f. Award all other relief that this Court deems just necessary and proper.

I HEREBY CERTIFY a true and correct copy of the foregoing was hand delivered this 10th day of December, 1997 to Dexter Lee, AUSA, 99 NE 4th Street, Miami, Florida 33132.

Respectfully submitted,

KURZBAN, KURZBAN, WEINGER
& TETZELI, P.A.
2650 SW 27th Avenue, 2nd Floor
Miami, Florida 33133
(305) 444-0060

By: /s/ Ira J. Kurzban
IRA J. KURZBAN, ESQ.
Florida Bar No. 225517
HELENA TETZELI, ESQ.
Florida Bar No. 759820

U.S. DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Office of the Immigration Judge

In the Matter of:	Case No.: A 17 566 876
/s/ Ralph Richardson	Docket: _____
RESPONDENT	IN DEPORTATION PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

Request having been made for a change in the custody status of the respondent pursuant to 8 C.F.R. 242, and having considered the representations of the Immigration and Naturalization Service and the respondent, it is **HEREBY ORDERED** that:

[X] The request for a change in the custody status of the respondent be denied.

[ ] The request for a change in the custody status of the respondent be granted and that the respondent be:

(1) [ ] released from custody on respondent's own recognizance; or,

[ ] released from custody upon posting a bond of $_____: and

(2) the conditions of the bond:

[ ] remain unchanged; or,

[ ] are changed as follows: _____
_____
_____

[X] Other arriving alien

/s/ Neale Foster
Immigration Judge

Date: 11/24/97

Appeal: RESERVED/WAIVED (A/I/B)

Ralph RICHARDSON, petitioner, v.
Janet RENO, Attorney General, et al.

No. 98-1361.

June 1, 1999.

Case below, 162 F.3d 1338.

On petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. ___, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
18201 S.W. 12 STREET, MIAMI, FLORIDA 33194

IN THE MATTER OF	)	A# 17 566 876
RALPH RICHARDSON	)	
RESPONDENT	)	
IN BOND PROCEEDINGS	)	

ORDER ON MOTION TO AMELIORATE CONDITIONS OF BOND

Respondent is an arriving alien in removal proceedings. He is not eligible for redetermine conditions of custody imposed by the Service, 8 C.F.R. 3.19. This court has no authority to redetermine the bond set by the service.

ORDER: Motion denied.

DONE AND ORDERED in chambers this 3rd. Day of August 1999.

/s/ Neale S. Foster
NEALE S. FOSTER
U.S. IMMIGRATION JUDGE

cc: Trial Attorney
Attorney

(LOGO)

U.S. Department of Justice

Executive Office for Immigration Review

Office of the Immigration Judge

18201 S.W. 12th Street
Miami, Florida 33194

IN THE MATTER OF	)	DATE: January 6, 1998
RALPH RICHARDSON	)	A# 17 566 876
IN REMOVAL PROCEEDINGS	)	DECISION ON A MOTION

Respondent/Applicant has filed a Motion to Reschedule Cont. Master Calendar on the above captioned case. The motion has been duly considered and it appears to the Court that:

[ ] The request is timely and reasonable; it is hereby ORDERED that the motion is granted.

[X] The motion has been duly considered and it appears to the Court that no substantial grounds have been advanced to warrant its grant. Therefore, it is ORDERED that the motion be and the same is hereby denied. Bond decision – including Habeas is separate from Immigration hearing –

/s/ Kenneth S. Hurewitz
KENNETH S. HUREWITZ
Immigration Judge

cc: Trial Attorney
Ira Kurzban, Esq.

U.S. COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-4230

RALPH RICHARDSON,

Plaintiff-Appellee,

versus

JANET RENO, Attorney General of the United States, DORIS MEISSNER, Commission, Immigration and Naturalization Service, ROBERT WALLIS, Acting District Director, Immigration and Naturalization Service, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE, and EXECUTIVE OFFICE OF IMMIGRATION REVIEW,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION(S) FOR RHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ___ F.2d ___).

Before: CARNES and HULL, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure, Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Hull
UNITED STATES CIRCUIT JUDGE

U.S. CONSTITUTION Art. 1

Section. 9, cl. 2.

* * *

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

* * *

AMENDMENT V

No person shall be . . . deprived of life, liberty, or property, without due process of law;

* * *

AMENDMENT VIII

* * *

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

* * *

---

8 U.S.C. § 1226(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who –

> (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
>
> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence [sic] to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of Title 18, that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an

investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

* * *

(e) Judicial review

The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

* * *

---

8 U.S.C. § 1252. Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this

section and except that the court may not order the taking of additional evidence under section 2347(e) of Title 28.

(2) Matters not subject to judicial review

* * *

(C) Orders against criminal aliens

Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

* * *

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

* * *

---

28 U.S.C. § 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restrain complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless –

> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
>
> (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

* * *

---

8 C.F.R. § 3.19 Custody/bond.

* * *

(d) Consideration by the Immigration Judge of an application or request of a respondent regarding custody or bond under this section shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding. The determination of the Immigration Judge as to custody status or bond may be based upon any information that is available to the Immigration Judge or that is presented to him or her by the alien or the Service.

* * *

(f) The determination of an Immigration Judge with respect to custody status or bond redetermination shall be entered on the appropriate form at the time such decision is made and the parties shall be informed orally or in writing of the reasons for the decision. An appeal from the determination by an Immigration Judge may be taken to the Board of Immigration Appeals pursuant to section 3.38.

(g) While any proceeding is pending before the executive Office for Immigration Review, the Service shall immediately advise the Immigration Court having

administrative control over the Record of Proceeding of a change in the respondent/applicant's custody location or of release from Service custody, or subsequent taking into Service custody, of a respondent/applicant. This notification shall be in writing and shall state the effective date of the change in custody location or status, and the respondent/applicant's current fixed street address, including zip code.

* * *

---

8 C.F.R. § 236.1 Apprehension, custody, and detention.

* * *

(c) Custody issues and release procedures.

(1)(i) After the expiration of the Transition Period Custody Rules under Public Law 104-208, no alien described in section 236(c)(1) of the Act shall be released from custody during removal proceedings except pursuant to section 236(c)(2) of the Act.

* * *

(5) An immigration judge may not exercise authority provided in this section and the review process described in paragraph (d) of this section shall not apply with respect to:

* * *

(d) Appeals from custody decisions.

(1) Application to immigration judge. After an initial custody determination by the district director, including the setting of a bond, the respondent may, at any time before an order under 8 CFR part 240 becomes final, request amelioration of the conditions under which he or she may be released. Prior to such final order, and except as otherwise provided in this chapter, the immigration judge is authorized to exercise the authority in section 236 of the Act (or section 242(a)(1) of the Act as designated prior to April 1, 1997 in the case of an alien in deportation proceedings) to detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may be released, as provided in § 3.19 of this chapter. If the alien has been released from custody, an application for amelioration of the terms of release must be filed within 7 days of release. Once a removal order becomes administratively final, determinations regarding custody and bond are made by the district director.

* * *

SEC. 303.

* * *

(3) TRANSITION PERIOD CUSTODY RULES. –

(A) IN GENERAL. – During the period in which this paragraph is in effect pursuant to paragraph (2), the Attorney General shall take into custody any alien who –

> (i) has been convicted of an aggravated felony (as defined under section 101(a)(43) of the Immigration and Nationality Act, as amended by section 321 of this Act),
>
> (ii) is inadmissible by reason of having committed any offense covered in section 212(a)(2) of such Act,
>
> (iii) is deportable by reason of having committed any offense covered in section 241(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of such Act (before redesignation under this subtitle), or
>
> (iv) is inadmissible under section 212(a)(3)(B) of such Act or deportable under section 241(a)(3)(B) of such Act (before redesignation under this subtitle),

when the alien is released without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(B) RELEASE. – The Attorney General may release the alien only if the alien is an alien described in subparagraph (A)(ii) or (A)(iii) and –

(i) the alien was lawfully admitted to the United States and satisfies the Attorney General that the alien will not pose a danger to the safety or other persons or of property and is likely to appear for any scheduled proceeding, or

(ii) the alien was not lawfully admitted to the United States, cannot be removed because the designated country of removal will not accept the alien, and satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding.

* * *

8 U.S.C. § 1101. Definitions

[INA § 101]

(a) As user in this chapter –

* * *

(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien –

(i) has abandoned or relinquished that status,

(ii) has been absent from the United States for a continuous period in excess of 180 days,

(iii) has engaged in illegal activity after having departed the United States,

(iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,

(v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or

(vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

* * *

8 U.S.C. § 1252
INA § 242

* * *

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection(a)(1) of this section, the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

* * *

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.

* * *

(e) Judicial review of orders under section 1225(b)(1)

* * *

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of –

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

* * *

---

8 C.F.R. § 1.1 Definitions.

* * *

(q) The term arriving alien means an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport. An arriving alien remains such even if paroled pursuant to section 212(d)(5) of the Act, except that an alien who was paroled before April 1, 1997, or an alien who was granted advance parole which the alien applied for and obtained in the United States prior to the alien's departure from and return to the United States, shall not be considered an arriving alien for purposes of section 235(b)(1)(A)(i) of the Act.

* * *

8 C.F.R. § 3.19 Custody/bond.

* * *

(2)(i) Upon expiration of the Transition Period Custody Rules set forth in section 303(b)(3) of Div. C. of Pub.L. 104-208, an immigration judge may not redetermine conditions of custody imposed by the Service with respect to the following classes of aliens:

(A) Aliens in exclusion proceedings;

(B) Arriving aliens in removal proceedings, including aliens paroled after arrival pursuant to section 212(d)(5) of the Act;

(C) Aliens described in section 237(a)(4) of the Act;

(D) Aliens in removal proceedings subject to section 236(c)(1) of the Act (as in effect after expiration of the Temporary Period Custody Rules); and

(E) Aliens in deportation proceedings subject to section 242(a)(2) of the Act (as in effect prior to April, 1997, and as amended by section 440(c) of Pub.L. 104-132.

* * *

Supreme Court, U.S.
FILED
FEB 25 2000
CLERK

(2)

No. 99-887

In the Supreme Court of the United States

RALPH RICHARDSON, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Acting Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
ERNESTO H. MOLINA, JR.
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

10/FP

QUESTIONS PRESENTED

Petitioner is a legal permanent resident alien who was convicted in state court of a criminal offense involving cocaine, left the United States for a brief period, and then sought to return to the United States. Upon his return the Immigration and Naturalization Service (INS) commenced removal proceedings against him as an alien "seeking admission into the United States," within the meaning of 8 U.S.C. 1101(a)(13) (1994 & Supp. IV 1998), and charged him with inadmissibility based on his drug offense. The INS also placed petitioner in detention, the INS District Director declined to grant him parole, and an immigration judge held that, under 8 C.F.R. 236.1, he had no authority to grant bond, as petitioner was an alien seeking admission. The questions presented are:

1. Whether the district court had authority under 28 U.S.C. 2241 to review petitioner's claim that, as a matter of statutory interpretation, he is an alien in the United States, not an alien seeking admission into the United States, and therefore he is entitled to a bond hearing before an immigration judge.

2. Whether the district court had authority under 28 U.S.C. 2241 to review petitioner's claims that, because petitioner has been treated as an alien seeking admission into the United States and thereby denied a bond hearing before an immigration judge, petitioner has been deprived of his rights under the Due Process Clause of the Fifth Amendment and the Excessive Bail Clause of the Eighth Amendment.

3. Whether petitioner was deprived of his rights under the Due Process Clause or the Excessive Bail Clause because the decision to detain him, and to deny him release pending the completion of his removal proceeding, was made

by an INS District Director (with the possibility of review by the Board of Immigration Appeals) rather than an immigration judge.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	15
Conclusion	29
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Adeniji, In re, Int. Dec. No. 3417 (B.I.A. Nov. 3, 1999)	5
Carlson v. *Landon*, 342 U.S. 524 (1952)	11, 29
Collado, In re, Int. Dec. No. 3333 (B.I.A. Feb. 26, 1998)	4
Felker v. *Turpin*, 518 U.S. 651 (1996)	24
Jean v. *Nelson*, 472 U.S. 846 (1985)	24
Joseph, In re, Int. Dec. No. 3387 (B.I.A. Apr. 23, 1999)	22
Joseph, In re, Int. Dec. No. 3398 (B.I.A. May 28, 1999)	22
Kwong Hai Chew v. *Colding*, 344 U.S. 590 (1953)	26
LaGuerre v. *Reno*, No. 99-418 (U.S. Feb. 22, 2000)	20
Landon v. *Plasencia*, 459 U.S. 21 (1982)	26, 27
Marcello v. *Bonds*, 349 U.S. 302 (1955)	28
Parra v. *Perryman*, 172 F.3d 954 (7th Cir. 1999)	19, 28
Reno v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999)	11, 23
Reno v. *Flores*, 507 U.S. 292 (1993)	22
Richardson v. *Reno*, 119 S. Ct. 2016 (1999)	5, 12
Rosenberg v. *Fleuti*, 374 U.S. 449 (1963)	9, 26, 27
Swain v. *Pressley*, 430 U.S. 372 (1977)	24

Cases—Continued: Page

United States v. *Simon*, 168 F.3d 1271 (11th Cir.), cert. denied, 120 S. Ct. 114 (1999) 15
Wong Yang Sung v. *McGrath*, 339 U.S. 33 (1950) 28
Yerger, Ex Parte, 75 U.S. (8 Wall.) 85 (1869) 24
Zadvydas v. *Underdown*, 185 F.3d 279 (5th Cir. 1999), petition for cert. pending, No. 99-7791 ..... 19, 20

Constitution, statutes and regulations:

U.S. Const.:
Art. I, § 9, Cl. 2 (Suspension of Habeas Corpus Clause) 11, 25
Art. III 11
Amend. V (Due Process Clause) 11
Amend. VIII (Excessive Bail Clause) 9, 21
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214:
§ 401(e), 110 Stat. 1268 24
§ 440(a), 110 Stat. 1276-1277 7
Hobbs Administrative Orders Review Act, 28 U.S.C. 2341-2351 (1994 & Supp. III 1997) 6-7
Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 2
§ 303(b)(2), 110 Stat. 3009-586 ..... 4, 5
§ 303(b)(3), 110 Stat. 3009-586 to 3009-587 4
§ 303(b)(3)(A)(ii), 110 Stat. 3009-587 27
§ 303(b)(3)(B)(i), 110 Stat. 3009-587 ..... 5, 28
§ 307, 110 Stat. 3009-612 6
§ 309(c)(4)(G), 110 Stat. 3009-626 7
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
8 U.S.C. 1101(a)(13) (1958) 9
8 U.S.C. 1101(a)(13) (1994 & Supp. IV 1998) 13
8 U.S.C. 1101(a)(13)(A) (Supp. IV 1998) 3
8 U.S.C. 1101(a)(13)(C)(v) (Supp. IV 1998) 3
8 U.S.C. 1101(a)(43)(B) (1994 & Supp. IV 1998) 4

Statutes and regulations—Continued: Page

8 U.S.C. 1105a (1994) 6
8 U.S.C. 1105a(a)(10) (1994) 24
8 U.S.C. 1182 (1994 & Supp. IV 1998) 18, 21
8 U.S.C. 1182(a) (1994 & Supp. IV 1998) 3
8 U.S.C. 1182(a)(2) (1994 & Supp. IV 1998) 4, 6, 9, 14, 16, 17, 19, 27
8 U.S.C. 1182(a)(2)(A)(i)(I) (1994 & Supp. IV 1998) 8, 13
8 U.S.C. 1182(a)(2)(A)(i)(II) (1994 & Supp. IV 1998) 8, 13
8 U.S.C. 1182(a)(2)(B) (1994 & Supp. IV 1998) 8
8 U.S.C. 1182(a)(2)(C) (1994 & Supp. IV 1998) ..... 3 ,8, 13, 18
8 U.S.C. 1182(d)(5) (1994 & Supp. IV 1998) 8
8 U.S.C. 1226 (1994 & Supp. IV 1998) 16, 22, 23
8 U.S.C. 1226(a) (1994 & Supp. IV 1998) 4, 5, 17
8 U.S.C. 1226(c) (1994 & Supp. IV 1998) 5, 16, 17, 18, 24, 28
8 U.S.C. 1226(c)(1) (1994 & Supp. IV 1998) 17, 19
8 U.S.C. 1226(c)(1)(A) (Supp. IV 1998) 4, 17
8 U.S.C. 1226(c)(1)(B) (Supp. IV 1998) 4, 17
8 U.S.C. 1226(c)(2) (1994 & Supp. IV 1998) 17
8 U.S.C. 1226(e) (1994 & Supp. IV 1998) 19, 23, 24
8 U.S.C. 1227 (1994 & Supp. IV 1998) 18, 21
8 U.S.C. 1227(a) (1994 & Supp. IV 1998) 3
8 U.S.C. 1229a (Supp. IV 1998) 3
8 U.S.C. 1229a(a)(1) (Supp. IV 1998) 3
8 U.S.C. 1229b(a) (Supp. IV 1998) 4
8 U.S.C. 1229b(a)(3) (Supp. IV 1998) 4, 28
8 U.S.C. 1252 (1994 & Supp. IV 1998) 6, 23, 24
8 U.S.C. 1252(a)(1) (1994 & Supp. IV 1998) 6
8 U.S.C. 1252(a)(2)(C) (1994 & Supp. IV 1998) 7, 8, 11, 18
8 U.S.C. 1252(b)(2) (1994 & Supp. IV 1998) 13

Statutes and regulations—Continued: Page

8 U.S.C. 1252(b)(9) (1994 & Supp. IV 1998) 7, 11-12, 13, 19, 20, 21, 23, 24

8 U.S.C. 1252(g) (1994 & Supp. IV 1998) 7, 10, 11, 12, 19, 20

28 U.S.C. 2241 ..... 10, 12, 15, 19, 20, 24

Fla. Stat. Ann. § 893.135(1)(b)(3) (West 1990) 8

8 C.F.R.:

Pt. 1:

Section 1.1(q) 6

Pt. 3:

Section 3.19(h)(1)(i)(B) 6

Section 3.19(h)(2)(i)(B) 18

Pt. 236 6

Section 236.1(c)(5)(i) (1998) 6

Section 236.1(d)(1) 6

Section 236.1(d)(2)(i) 6

Section 236.1(d)(3)(ii) 6

Miscellaneous:

63 Fed. Reg. (1998):

pp. 27,444-27,445 22

p. 27,449 6

In the Supreme Court of the United States

No. 99-887

RALPH RICHARDSON, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals from which review is sought (Pet. App. 1-17) is reported at 180 F.3d 1311. An earlier decision of the court of appeals (Pet. App. 18-118) is reported at 162 F.3d 1338. The opinion of the district court (Pet. App. 122-135) is reported at 994 F. Supp. 1466. The report and recommendation of the magistrate judge (Pet. App. 136-149) is unreported. Reprinted in appendices to this brief are the initial decision of the immigration judge ordering petitioner deported (App., *infra*, 9a-11a), the decision of the Board of Immigration Appeals affirming that decision in part and remanding in part (App., *infra*, 12a-26a), the decision of the immigration judge on remand again ordering petitioner deported (App., *infra*, 28a-60a), and decisions of

the District Director declining to release petitioner (App., *infra*, 5a-6a, 7a-8a, 64a-65a).

JURISDICTION

The judgment of the court of appeals was entered on July 14, 1999. A petition for rehearing was denied on August 25, 1999 (Pet. App. 176-177). The petition for a writ of certiorari was filed on November 23, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a challenge to the application and the constitutionality of interim provisions of new immigration laws, concerning the detention of lawful permanent resident aliens who were convicted of controlled substance offenses, left the United States for a brief trip abroad, and then sought to return to the United States. The statutes and regulations at issue here provide that such a criminal alien seeking to return may be treated as an "arriving alien" seeking admission into the United States, charged with inadmissibility (rather than deportability) in his removal proceedings, and placed in detention pending the outcome of the removal proceedings, with the opportunity to apply to the INS District Director for parole, but not a right to a bond hearing before an immigration judge (IJ). Also at issue in this case are new statutory provisions that significantly restrict and streamline the timing and availability of judicial review of legal and factual issues that may arise in such an alien's removal proceeding.

1. a. In 1996, the Immigration and Nationality Act (INA) was comprehensively revised by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009. IIRIRA eliminated the provisions under prior law for "deportation" proceedings (covering aliens already in the United States) and "exclusion" proceedings (covering aliens seeking to make an

entry into the United States), and instead created one new form of proceeding, known as "removal." See 8 U.S.C. 1229a (Supp. IV 1998).

IIRIRA did retain some distinctions in removal proceedings, however, based on whether the alien had been lawfully admitted into the United States. Aliens who have already been lawfully admitted in the United States may be removed from the United States if they are found to be "deportable" on one or more grounds. See 8 U.S.C. 1227(a) (1994 & Supp. IV 1998); 8 U.S.C. 1229a(a)(1) (Supp. IV 1998). Aliens seeking admission into the United States may be denied admission and removed if they are found to be "inadmissible" on one or more grounds. See 8 U.S.C. 1182(a) (1994 & Supp. IV 1998); 8 U.S.C. 1229a(a)(1) (Supp. IV 1998). The grounds of inadmissibility and deportability, although in large part overlapping, are not entirely coterminous. For example, an alien seeking admission may be deemed "inadmissible" if the immigration officer "knows or has reason to believe" that the alien "is or has been an illicit trafficker" in controlled substances, even if the alien has not actually been convicted of such drug trafficking. See 8 U.S.C. 1182(a)(2)(C) (1994 & Supp. IV 1998). There is no equivalent ground of "deportability" for an alien who has been lawfully admitted into the United States.

IIRIRA defines "admission" and "admitted" to refer to "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. 1101(a)(13)(A) (Supp. IV 1998). IIRIRA further provides that an alien lawfully admitted for permanent residence "shall not be regarded as seeking an admission into the United States for purposes of the immigration laws" *except* under certain circumstances, including when the alien "has committed an offense identified in [8 U.S.C.] 1182(a)(2)." 8 U.S.C. 1101(a)(13)(C)(v) (Supp. IV 1998). Thus, a lawful permanent resident alien who has committed

a criminal offense covered by Section 1182(a)(2), and who leaves the country and thereafter seeks to return, is to be regarded as an alien "seeking an admission into the United States." See *In re Collado*, Int. Dec. No. 3333, at 5-6 (B.I.A. Feb. 26, 1998).

Some aliens who are removable (whether deportable or inadmissible) based on a criminal offense may apply to the Attorney General for discretionary relief from removal (known as "cancellation of removal" under the new terminology of IIRIRA). See 8 U.S.C. 1229b(a) (Supp. IV 1998). An alien who is removable based on a conviction for an "aggravated felony," however, is ineligible for cancellation of removal. 8 U.S.C. 1229b(a)(3) (Supp. IV 1998). The INA defines "aggravated felony" to include illicit trafficking in a controlled substance. 8 U.S.C. 1101(a)(43)(B).

b. In IIRIRA, Congress provided that an alien against whom removal proceedings are commenced may be detained pending a decision whether the alien is to be removed from the United States. 8 U.S.C. 1226(a) (Supp. IV 1998). IIRIRA further provides that any alien who is inadmissible or deportable because of certain kinds of criminal conduct (including an aggravated felony or controlled substance offense) must be detained without bond pending the outcome of the removal proceeding. 8 U.S.C. 1226(c)(1)(A) and (B) (Supp. IV 1998). When Congress enacted that mandatory detention provision in IIRIRA, however, it also authorized the Attorney General to postpone its final implementation for one or two years. See IIRIRA § 303(b)(2), 110 Stat. 3009-586. To address the possibility that the Attorney General might elect to do so, Congress enacted certain Transition Period Custody Rules (TPCR) to apply in the interim. See IIRIRA § 303(b)(3), 110 Stat. 3009-586 to 3009-587. The TPCR authorized the Attorney General to release from custody certain criminal aliens if they were "lawfully admitted to the United States" and satisfied the Attorney

General that they would not pose a danger to persons or property and would appear for removal proceedings. IIRIRA § 303(b)(3)(B)(i), 110 Stat. 3009-587. That discretionary relief from detention for aliens convicted of aggravated felonies and controlled substance offenses is available only to aliens taken into custody before or during the period in which the TPCR were in effect. After expiration of the TPCR, the mandatory-detention provision of Section 1226(c) applies to similar aliens who are released from criminal custody on or after the date that the TPCR expired. See IIRIRA § 303(b)(2), 110 Stat. 3009-586.[1]

The Attorney General exercised her authority to delay the final implementation of the permanent detention rules of IIRIRA for two years. She also promulgated regulations governing the detention of criminal aliens under the TPCR. Those regulations provided generally that, in the case of an

---

[1] In our response to petitioner's prior certiorari petition, we informed the Court that, because the TPCR had expired, petitioner's detention was no longer governed by the TPCR, but was controlled by the mandatory-detention provisions of Section 1226(c), and petitioner's challenge based on the TPCR was therefore moot. See Gov't Br. at 14, *Richardson* v. *Reno*, 119 S. Ct. 2016 (1999) (No. 98-1361). After the Court remanded this case to the court of appeals, and indeed after the government filed its initial brief on remand in the court of appeals, but before the government filed its reply brief on remand, the INS reexamined its construction of the effective dates of Section 1226(c). The INS then concluded that Section 1226(c) applies only to aliens who are released from criminal detention and taken into INS custody after the expiration of the TPCR. See Gov't C.A. Supp. Reply Br. 4-6 (July 1999) (informing court of appeals of government's change in position); *In re Adeniji*, Int. Dec. No. 3417, at 8-12 (B.I.A. Nov. 3, 1999) (accepting INS position); IIRIRA § 303(b)(2), 110 Stat. 3009-586 ("the provisions of such [Section 1226(c)] shall apply to individuals released after such periods"). Because petitioner was taken into custody during the period of effectiveness of the TPCR, his current detention is not mandatory, but is governed by the Attorney General's general discretionary authority under Section 1226(a) to detain aliens who are placed in removal proceedings.

alien who had been lawfully admitted to the United States and was thereafter placed in detention pending his removal proceedings, the alien, after an initial custody determination made by an INS District Director, could apply to an IJ for release upon bond. 8 C.F.R. 236.1(d)(1). The TPCR regulations also provided, however, that an IJ would have no authority to cases involving "arriving aliens," 8 C.F.R. 236.1(c)(5)(i) (1998),[2] defined elsewhere in INS regulations to mean "an alien who seeks admission to * * * the United States * * * at a port-of-entry," 8 C.F.R. 1.1(q). "Arriving aliens," under the TPCR, could apply only to a District Director, not an IJ, for release on bond, and could appeal from an adverse decision of the District Director to the Board of Immigration Appeals (BIA). 8 C.F.R. 236.1(d)(1), (d)(2)(i) and (d)(3)(ii). Accordingly, since a lawful permanent resident alien who had been convicted of a criminal offense covered by Section 1182(a)(2), and who left the country and thereafter sought to return, was considered an "alien seeking an admission" (see pp. 3-4, *supra*), under the TPCR such an alien could apply only to the District Director (with subsequent appeal to the BIA), not to an IJ, for release from detention.

c. IIRIRA enacted significant changes to the provisions governing judicial review of removal proceedings. IIRIRA repealed former 8 U.S.C. 1105a (1994), which had governed judicial review of final orders of deportation and exclusion. 110 Stat. 3009-612. In its stead, Congress enacted a new 8 U.S.C. 1252 (Supp. IV 1998). Section 1252(a)(1) provides that "[j]udicial review of a final order of removal * * * is

---

[2] Portions of 8 C.F.R. Part 236 were significantly revised in 1998. See 63 Fed. Reg. 27,449 (1998). The substance of the same restriction on the IJs' authority to review District Directors' custody determinations concerning arriving aliens under the TPCR remains in force at 8 C.F.R. 3.19(h)(1)(i)(B).

governed only by" the provisions of the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341-2351 (1994 & Supp. III 1997), which places exclusive review of final orders of certain agencies in the regional courts of appeals (and not the district courts). Section 1252(b)(9) underscores the exclusive authority of the courts of appeals in removal matters by providing that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section." 8 U.S.C. 1252(b)(9) (Supp. IV 1998). And Section 1252(g) further provides that, "[e]xcept as provided in this section [*i.e.*, Section 1252] and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the INA]."

IIRIRA also imposed significant restrictions on the authority of the courts of appeals to review challenges to removal orders entered against certain classes of criminal aliens. In 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998), Congress provided that, "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" certain criminal offenses, including controlled substance offenses.[3]

---

[3] Section 1252(a)(2)(C) built on similar provisions enacted in Section 440(a) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1276-1277, and in Section 309(c)(4)(G) of IIRIRA, 110 Stat. 3009-626, which govern judicial review of final orders of deportation entered before the full effective date of IIRIRA, April 1, 1997. The government has argued that neither Section

2. Petitioner is a native and citizen of Haiti. He was admitted to the United States in 1968 as a lawful permanent resident. In 1990, he was convicted of violating Fla. Stat. Ann. § 893.135(1)(b)(3) (West 1990), which prohibits selling, purchasing, manufacturing, or delivering cocaine, and also prohibits "actual or constructive possession of 28 grams or more of cocaine." See App., *infra*, 22a. Petitioner was sentenced to five years in prison for the cocaine offense. Pet. App. 21.

On October 26, 1997, petitioner attempted to enter the United States after a two-day trip to Haiti. During petitioner's inspection for admission, he admitted to having been convicted on his cocaine offense, as well as other offenses. Petitioner was then detained. Pet. App. 123-124, 151. On the same day, the INS commenced removal proceedings against petitioner, charging him with inadmissibility under 8 U.S.C. 1182(a)(2)(A)(i)(I) and (II), (B) and (C) (1994 & Supp. IV 1998) (referring respectively to a conviction of a crime involving moral turpitude, a conviction of a controlled substance offense, multiple criminal convictions, and engaging in drug trafficking). App., *infra*, 1a-4a. On November 13, 1997, petitioner requested parole from the INS District Director. While that request was pending, petitioner also requested parole from an IJ. On November 24, 1997, the IJ concluded that he had no authority under the TPCR to grant petitioner parole pursuant to 8 U.S.C. 1182(d)(5) or release

---

440(a) of AEDPA nor Section 309(c)(4)(G) of IIRIRA divested the courts of appeals of jurisdiction to review threshold questions of alienage and deportability to determine whether the preclusion of review provision in fact applies to a petition for review at hand, and that neither Section should be read to preclude the courts of appeals from entertaining constitutional challenges made by criminal aliens to the INA itself. We take a similar view of Section 1252(a)(2)(C), as added by IIRIRA. See Pet. App. 108-110 (court of appeals agreeing with that position in its prior decision in this case).

on bond, as petitioner was an "arriving alien," having been charged with inadmissibility based on criminal convictions and activity covered by Section 1182(a)(2). Pet. 7; Pet. App. 171-172. On December 4, 1997, the District Director also denied petitioner's request for parole. The District Director concluded, based on petitioner's convictions, that his release was not in the public interest, and that there were no humanitarian reasons for granting parole. App., *infra*, 5a-6a. Petitioner did not appeal to the BIA from the decision of either the IJ or the District Director.

3. On November 26, 1997, petitioner filed a petition for a writ of habeas corpus in district court. See Pet. App. 150-170. Petitioner alleged that, insofar as he was treated under the TPCR as an "arriving alien" seeking admission to the United States (and therefore not entitled to a bond hearing before an IJ) rather than a returning lawful permanent resident alien, the TPCR regulations were contrary to the "entry" doctrine of *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963). See Pet. App. 167.[4] He also contended that his treatment as an arriving alien under the TPCR violated equal-protection principles by creating a class of lawful permanent residents who are not afforded a hearing before an IJ because of their brief departure from the United States, while affording such a hearing to lawful permanent residents who have not departed the United States. *Id.* at 158. He further alleged that the denial of a bond hearing before an IJ and his detention without bail violated procedural due process, substantive due process, and the Excessive Bail Clause of the Eighth Amendment. *Id.* at 161-166.

---

[4] Under *Fleuti*, which construed the term "entry" in the INA as it existed prior to IIRIRA, a permanent resident alien who made a brief, casual, and innocent trip abroad and then sought to return to the United States was deemed not to be seeking an "entry" into the country upon his return. See 374 U.S. at 451-461 (discussing 8 U.S.C. 1101(a)(13) (1958)).

On February 13, 1998, the district court granted the writ of habeas corpus and ordered a hearing to be held by an IJ on the issue whether petitioner was an "arriving alien." Pet. App. 122-135. The district court ruled that it had jurisdiction to entertain the claims in petitioner's habeas corpus petition. *Id.* at 125. (Although the district court did not cite a specific statutory provision for its jurisdiction, it presumably relied on the general federal habeas corpus statute, 28 U.S.C. 2241.) On the merits, the district court ruled that the regulations' treatment of criminal aliens such as petitioner as "arriving aliens" is contrary to the INA. The court concluded that, when Congress enacted IIRIRA, it did not intend to supersede the *Fleuti* rule, under which lawful permanent resident aliens returning to the United States from a brief, casual, and innocent trip abroad were not treated as aliens seeking entry into the United States. Pet. App. 132-134.

4. Respondents appealed the grant of habeas corpus to the court of appeals (which granted a stay of the district court's order pending appeal). On December 22, 1998, the court of appeals vacated the district court's order for lack of jurisdiction. The court of appeals ruled that 8 U.S.C. 1252(g) (Supp. IV 1998) had divested the district court of authority to hear petitioner's challenges under 28 U.S.C. 2241. Pet. App. 18-118.

After reviewing IIRIRA's far-reaching changes to the immigration laws (Pet. App. 28-56), the court concluded that Section 1252(g) is "plain and clear" and "provides for judicial review for aliens only in the court of appeals and only after a final removal order." *Id.* at 60. The court rejected petitioner's reliance on the rule against repeals of habeas corpus jurisdiction by implication, concluding that Section 1252(g) was phrased sufficiently broadly to include a bar to review by way of habeas corpus. *Id.* at 63-64. The court also rejected petitioner's argument that Section 1252(g) "affects

only final removal orders" and does not address "interim detention orders" such as those denying bond and parole. *Id.* at 63 n.100.

The court of appeals then rejected petitioner's contention that the elimination of the district court's habeas jurisdiction over his claim would contravene the Due Process Clause, Article III, and the Suspension of Habeas Corpus Clause. Pet. App. 65-88. The court concluded that, although Section 1252(a)(2)(C) had imposed significant restrictions on the court of appeals' review of challenges to removal orders entered against criminal aliens, the judicial review remaining available to an alien in petitioner's position on such a petition for review (see pp. 7-8 n.3, *supra*) is a constitutionally sufficient alternative to habeas corpus. Pet. App. 108-109.

The court also rejected (Pet. App. 76) petitioner's argument that limiting his opportunity to request bond to a written submission to the INS District Director rather than providing a hearing before an IJ deprived him of due process. The court further held (*id.* at 77 n.119) that "Congress acts well within its plenary power in mandating detention of a criminal alien with an aggravated felony conviction facing removal proceedings," and that mandatory detention "poses no constitutional issue." *Ibid.* (citing *Carlson* v. *Landon*, 342 U.S. 524, 545 (1952) (ellipsis and internal quotation marks omitted)).

5. Petitioner filed a petition for a writ of certiorari. While that petition was pending, this Court decided *Reno* v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) (*AADC*). In *AADC*, the Court rejected a broad reading of Section 1252(g) as covering "all deportation-related claims," *id.* at 478, and instead construed that Section to cover only "three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" *Id.* at

482 (quoting Section 1252(g); emphasis added in *AADC*). The Court contrasted Section 1252(g) with Section 1252(b)(9), which it described as an "unmistakable 'zipper' clause," channeling into the courts of appeals all issues arising from any actions taken or proceedings brought to remove alien from the United States. *Id.* at 483. Because this Court's decision in *AADC* superseded the Eleventh Circuit's construction of Section 1252(g), the government urged the Court to grant petitioner's certiorari petition, vacate the decision of the court of appeals, and remand the case for further consideration in light of *AADC*. The Court disposed of the petition in that manner on June 1, 1999. 119 S. Ct. 2016 (1999); Pet. App. 173.

6. On remand from this Court, the court of appeals again concluded that the district court lacked jurisdiction over petitioner's claims under 28 U.S.C. 2241, but it based its conclusion principally on Section 1252(b)(9), rather than Section 1252(g). Pet. App. 1-17. The court stated that Section 1252(b)(9) provides "clear evidence of Congress' desire to abbreviate judicial review to one place and one time: only in the court of appeals and only after a final removal order and exhaustion of all administrative remedies." *Id.* at 6 (internal quotation marks and brackets omitted). Thus, the court ruled, "[j]udicial review of the issues raised in [petitioner's] § 2241 petition must await a final BIA removal order and can occur in the court of appeals through a petition to review that final order." *Id.* at 8.

The court again concluded that IIRIRA's limitation on district court habeas corpus jurisdiction under 28 U.S.C. 2241 is not unconstitutional on its face or as applied to petitioner. Pet. App. 9. The court observed that Section 1252(a)(2)(C) "does not remove all judicial review" for criminal aliens, and that at a minimum, judicial review remains available after entry of a final removal order "to determine if the specific conditions exist that bar jurisdiction in the court

of appeals." *Ibid.* Moreover, after entry of a final removal order, the court of appeals could then consider whether that remainder of judicial review satisfies the Constitution; if not, petitioner could then pursue "adequate and effective judicial review of statutory and constitutional issues" in the court of appeals, pursuant to Section 1252(b)(2) and (b)(9). *Ibid.*

The court also rejected petitioner's argument that claims challenging detention fall outside the scope of Section 1252(b)(9). Pet. App. 12-13. The court observed that petitioner's claims involve "mainly whether the INS properly detained Richardson as an 'arriving alien' and whether the denial of bond and parole by the INS District Director, without a subsequent individualized hearing before an Immigration Judge, violated Richardson's constitutional rights." *Id.* at 13. The court ruled that those claims fall within Section 1252(b)(9) because that Section "is not limited to any particular form of proceeding; rather it applies to 'any action taken or proceeding brought to remove an alien.'" *Id.* at 15 (quoting Section 1252(b)(9)). "Any action taken" to remove an alien, the court held, "encompasses detention as the first step in the removal process." *Id.* at 15-16.

7. While the government's initial appeal to the court of appeals was pending, on January 8, 1998, an IJ found petitioner inadmissible pursuant to 8 U.S.C. 1182(a)(2)(A)(i)(I) (conviction of crime involving moral turpitude), 1182(a)(2)(A)-(i)(II) (conviction of controlled substance offense), and 1182(a)(2)(C) (Supp. IV 1998) (engaging in drug trafficking). The IJ also found petitioner statutorily ineligible for cancellation of removal based on the conclusion that his cocaine offense was an aggravated felony. Petitioner was ordered deported to Haiti. App., *infra*, 9a-10a.

On May 5, 1999, the BIA affirmed the IJ's decision in several respects, but sustained petitioner's appeal on one issue, and remanded the case for further proceedings. Among other things, the BIA concluded that petitioner was indeed

an "alien seeking admission" under 8 U.S.C. 1101(a)(13) (Supp. IV 1998). App., *infra*, 18a-20a. Relying on its decision in *In re Collado*, *supra*, the BIA ruled that IIRIRA had repealed the "entry" doctrine as articulated in *Fleuti*, and replaced the concept of "entry" with a new definition of "admission." Under the new "admission" definition, a lawful permanent resident who was convicted of a criminal offense, leaves the United States, and seeks to return is "to be regarded as an alien seeking admission into the United States, without further inquiry into the nature and circumstances of a departure from and return to this country." *Id.* at 19a. Since petitioner had been convicted of a controlled substance offense covered by Section 1182(a)(2), the BIA concluded that he "is to be regarded as an alien seeking admission." *Ibid.*

The BIA agreed with petitioner, however, that there was insufficient evidence to conclude that the controlled substance offense of which he was convicted constituted an aggravated felony, barring him from eligibility for the discretionary relief of cancellation of removal. The BIA observed that the Florida statute under which petitioner was convicted reached both trafficking offenses such as sale of cocaine, and also simple possession of more than 28 grams of cocaine, which would not be an aggravated felony under the INA if it was a first offense. The BIA remanded the case to the IJ on this issue, and expressly held that the INS was not precluded from adducing additional evidence to demonstrate that petitioner was convicted of an aggravated felony. App., *infra*, 20a-25a.

On remand, the IJ initially concluded that petitioner had not been convicted of an aggravated felony and was therefore eligible for cancellation of removal (see App., *infra*, 27a), but on November 15, 1999, after taking additional evidence, the IJ reversed himself and concluded that petitioner was

indeed an aggravated felon (*id.* at 34a-36a).[5] The IJ also determined that petitioner should not be granted cancellation of removal as a matter of discretion. *Id.* at 37a-60a. The IJ therefore again ordered petitioner deported. *Id.* at 60a. Petitioner's appeal from the IJ's decision is currently pending before the BIA.[6]

ARGUMENT

Petitioner urges the Court to decide whether the court of appeals erred in concluding that the district court lacked jurisdiction under 28 U.S.C. 2241 to entertain his statutory and constitutional claims arising out of the Attorney General's decision to treat him as an "arriving alien," and thereby not to afford him the opportunity for a bond hearing before an IJ that is afforded to aliens in the United States who were convicted of similar crimes. Petitioner also challenges that decision on the merits. The specific claims raised by petitioner, however, have little prospective significance, because, for purposes of detention, the distinction under the TPCR between legal permanent aliens convicted of drug offenses who are seeking to return to the United States and similar aliens placed in removal proceedings in the United

---

[5] The IJ relied on Eleventh Circuit case law to the effect that a conviction for possession of a controlled substance, if punished as a felony under state law, is deemed an aggravated felony. See App., *infra*, 35a-36a; *United States* v. *Simon*, 168 F.3d 1271 (11th Cir.), cert. denied, 120 S. Ct. 114 (1999). The BIA had previously declined to follow the *Simon* decision. App., *infra*, 24a-25a. The IJ also relied on other circuit case law to the effect that possession of an amount of cocaine too large for personal use may be considered illicit trafficking and therefore treated as an aggravated felony. *Id.* at 35a.

[6] Petitioner also made a new request to the District Director for release on bond. The District Director initially decided that petitioner should be released on a $25,000 bond, App., *infra*, 61a-64a, but a few days later, after receiving additional information about petitioner's convictions, revoked petitioner's bond, *id.* at 65a.

States has expired. After expiration of the TPCR, both classes of criminal aliens are now covered by the mandatory detention provisions of 8 U.S.C. 1226 (Supp. IV 1998). While the INA does continue to make distinctions between arriving aliens and aliens placed in removal proceedings in the United States for purposes of detention, this case does not raise those issues. In addition, the court of appeals' jurisdictional decision is correct and does not conflict with any decision of another court of appeals or this Court. Petitioner's arguments on the merits of his claims were not addressed by the court of appeals, and in any event are incorrect. Further review is therefore not warranted.

1. Petitioner's claims ultimately derive from the fact that, as a legal permanent resident alien who sought to return to the United States and was charged with inadmissibility based on Section 1182(a)(2), he was treated as an "arriving alien," was placed in detention, and under the TPCR, was limited to requesting parole from the District Director rather than bond from an IJ. Petitioner observes that if he had been placed in removal proceedings in the United States, he would have had the opportunity for a bond hearing before an IJ. For the purpose of detention of criminal aliens pending their removal proceeding, however, that distinction has little ongoing relevance. The distinction was pertinent to petitioner's detention because the Attorney General elected to postpone the operation of the permanent mandatory-detention provisions of Section 1226(c) and to proceed for a two-year period under the TPCR, which gave immigration authorities (whether a District Director or an IJ) discretion to release aliens charged with inadmissibility or deportability based on drug offenses.

That discretion no longer exists in the cases of many criminal aliens released from criminal detention and taken into INS custody after expiration of the TPCR (with

exceptions not pertinent here),[7] whether or not the alien is returning from a trip abroad. Under Section 1226(c)(1), the Attorney General "shall take into custody" any alien who is inadmissible based on Section 1182(a)(2) (which covers the cocaine conviction forming one of the bases of petitioner's removal proceeding) or who is deportable by reason of having been convicted of one of various crimes, including any controlled substance offense. See 8 U.S.C. 1226(c)(1)(A) and (B) (Supp. IV 1998). Thus, if petitioner were released from criminal custody today, and removal proceedings were then commenced against him, now that the TPCR expired, he would be subject to mandatory detention under Section 1226(c)(1) because of his cocaine conviction, whether he was in the United States or was instead seeking to return from a trip abroad.[8]

For purposes of the detention of criminal aliens, therefore, the distinction between "arriving aliens" and those placed in removal proceedings in the United States has lost much of its significance.[9] That is not to say that the distinction has

---

[7] Under the permanent detention provisions, the Attorney General may release a criminal alien (whether deportable or inadmissible) covered by Section 1226(c) in order to provide protection to a person such as a witness or cooperating individual. See 8 U.S.C. 1226(c)(2) (Supp. IV 1998). Petitioner has not asserted that his release could be justified on such a basis.

[8] As we have explained above (p. 5 n.1, *supra*), the mandatory-detention provision of Section 1226(c) applies only to aliens released from custody after expiration of the TPCR. Petitioner's detention is therefore not covered by Section 1226(c). Accordingly, this case does not present an appropriate occasion to consider any issues that might arise concerning the applicability or constitutionality of mandatory detention under Section 1226(c)(1).

[9] Aliens other than criminal aliens may also be detained in the discretion of the Attorney General, pending the outcome of their removal proceedings. See 8 U.S.C. 1226(a) (Supp. IV 1998). For non-criminal aliens, the distinction between "arriving aliens" and other aliens retains

lost significance for all purposes. The removal of "arriving aliens," including aliens such as petitioner, continues to be governed by the standards of inadmissibility in Section 1182, whereas the removal of aliens who have been admitted and are in the United States continues to be governed by the standards of deportability in Section 1227. Moreover, petitioner has been charged with grounds of inadmissibility, not deportability. See App., *infra*, 3a-4a. One of the grounds of inadmissibility against petitioner, based on Section 1182(a)(2)(C), has no precise analogue under Section 1227, and the IJ found petitioner inadmissible on that basis (among others). See App., *infra*, 10a, 60a.

Petitioner has the opportunity in his removal proceedings, however, to contest the charge that he is "inadmissible" as an "arriving alien." Indeed, he raised that contention on his previous appeal to the BIA, which rejected it based on its decision in *In re Collado*, *supra*. See App., *infra*, 19a-20a. In addition, in our view, petitioner will be able to raise that argument in a petition for review of any final removal order in the court of appeals. The court of appeals will not be precluded from considering it under Section 1252(a)(2)(C), because that issue goes to an element of the threshold question whether his criminal offense is "covered in section 1182(a)(2)," and therefore whether the statutory jurisdictional bar therefore applies to his case. See 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998) (precluding judicial review of "any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2)"). There accordingly would be no occasion

---

significance for purposes of detention, because an IJ may not review a District Director's custody determination concerning an arriving alien placed in removal proceedings. See 8 C.F.R. 3.19(h)(2)(i)(B). Because petitioner is a criminal alien who would be subject to mandatory detention under Section 1226(c) had he been released from criminal detention after expiration of the TPCR, that distinction has no pertinence to this case.

for the Court in this case, in its present posture, to address whether the Attorney General has properly concluded that legal permanent resident aliens convicted of criminal offenses covered in Section 1182(a)(2) who leave the United States and seek to return should be treated as "arriving aliens." Because the merits of all of petitioners' claims either have little ongoing significance in the detention context or may be resolved later on review of a final order of removal, this Court's review is not warranted.

2. The court of appeals concluded that the district court lacked jurisdiction under 28 U.S.C. 2241 to entertain petitioner's challenges to the Attorney General's decision to treat him as an arriving alien—which meant, among other things, that petitioner was not afforded a bond hearing before an IJ. That jurisdictional ruling does not warrant this Court's review.

a. Contrary to petitioner's contention (Pet. 15-17), the court of appeals' decision does not conflict with *Parra* v. *Perryman*, 172 F.3d 954 (7th Cir. 1999), or *Zadvydas* v. *Underdown*, 185 F.3d 279 (5th Cir. 1999), petition for cert. pending, No. 99-7791. *Parra* presented a challenge to the constitutionality of IIRIRA's mandatory-detention provision, Section 1226(c)(1), not the validity of the Attorney General's decision to classify aliens like petitioner as "arriving aliens." The Seventh Circuit concluded that neither Section 1226(e) nor Section 1252(g) precluded district court jurisdiction to entertain challenges to the constitutionality of Section 1226(c)(1) itself, "as opposed to decisions implementing that subsection." 172 F.3d at 957. In this case, by contrast, most of petitioner's claims proceed from the premise that the Attorney General incorrectly decided to apply one regime rather than another to his case. Nor did the Seventh Circuit address Section 1252(b)(9), on which the court of appeals principally relied in this case to conclude

that the substance of petitioner's claims could be entertained on a petition for review of a final removal order.

Zadvydas presents a constitutional challenge to the INS's continued detention of an alien, *after* entry of a final order of deportation against him, because no other country would agree to accept the alien. The Fifth Circuit held that Section 1252(g) did not preclude the district court from entertaining a challenge to that detention on habeas corpus; it did not address Section 1252(b)(9). 185 F.3d at 285. In that case, however, the alien's constitutional claim necessarily could not have been covered by Section 1252(b)(9), because while Section 1252(b)(9) requires the consolidation of all legal and factual questions arising out of the alien's removal proceedings in one petition for review of the final order of removal, the alien was challenging only his detention *after* entry of his final order of deportation. Questions arising out of the alien's detention after the removal proceeding and any judicial review thereof have been completed do not implicate the "zipper clause" of Section 1252(b)(9).[10]

b. The court of appeals correctly concluded that Section 1252(b)(9) precludes district court review (even under 28 U.S.C. 2241) of petitioner's specific challenges to his detention. Section 1252(b)(9) provides:

---

[10] Petitioner also suggests (Pet. 16-17) that the decision below conflicts with decisions of several circuits holding that AEDPA and the provisions of IIRIRA governing deportation cases commenced before April 1, 1997, did not withdraw the district courts' authority to entertain statutory and constitutional challenges to deportation orders under 28 U.S.C. 2241. As petitioner notes (Pet. 16-17), however, those decisions did not involve detention issues under the new permanent removal provisions of IIRIRA, and therefore have little relevance to this case. This Court recently denied review of a petition directly raising the issue of the district courts' authority under Section 2241 to entertain such challenges. See *LaGuerre v. Reno*, No. 99-418 (Feb. 22, 2000).

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under [Section 1252].

8 U.S.C. 1252(b)(9) (Supp. IV 1998). That capacious language captures the claims raised by petitioner. Petitioner has claimed (Pet. App. 167) that he is not an "arriving alien" under the INA, and therefore the INS may not charge him as "inadmissible" under Section 1182; rather, he must be charged as a "deportable" alien under Section 1227. Petitioner has also contended (*id.* at 158-161) that, if the INA does treat him as an "arriving alien," then the INA violates equal protection by distinguishing him from legal permanent resident aliens who have not left the United States.[11] Those claims go directly to the question whether petitioner is removable under the theories put forth by the INS in his removal proceeding. Petitioner may raise those objections in his removal proceedings and on a petition for review, and should the court of appeals agree with petitioner that the

---

[11] Petitioner argues (Pet. 19-22) that Section 1252(b)(9) does not preclude the district court from deciding whether principles of procedural due process, substantive due process, or the Excessive Bail Clause require that an IJ, rather than the District Director, determine whether he should be detained pending the outcome of his removal proceeding. Those arguments, however, are necessarily derivative of petitioner's claim that he should not be treated as an "arriving alien" under the INA; petitioner argues that the Attorney General erred in assigning him to the class of arriving aliens, and that he should be afforded the greater procedural rights appropriate to his allegedly proper status. See Pet. 22 (petitioner "challenges solely the constitutionality of depriving lawful permanent residents of their right to a bond hearing *merely because of a regulatory characterization* that they are seeking entry") (emphasis added).

INA or the Constitution precludes him from being removed as an inadmissible arriving alien, then any removal order entered against him on that basis will be overturned.

Petitioner argues (Pet. 22), however, that Section 1252(b)(9) does not expressly reach *detention* decisions, and therefore a district court may decide whether the INS's decision to detain him as an inadmissible alien comports with the INA and the Constitution. That argument, however, misapprehends the nature of the INS's decision to detain an alien at the commencement of his removal proceeding, as authorized by Section 1226 and the TPCR. In detaining such an alien, the INS does not make a definitive, conclusive determination that the alien is in fact inadmissible; that determination is made in the alien's removal proceeding. Rather, when the INS detains an alien under Section 1226, it does so because there is "reason to believe" the alien is inadmissible or deportable on a certain ground. See *In re Joseph*, Int. Dec. No. 3387, at 9-10 (B.I.A. Apr. 23, 1999); 63 Fed. Reg. 27,444-27,445 (1998); cf. *Reno* v. *Flores*, 507 U.S. 292, 313 (1993) (noting that, in deciding whether to detain a juvenile alien, the INS asks: "Is there reason to believe the alien deportable?"). The INS determines whether the documents and materials supporting the charge of inadmissibility or deportability on their face establish that the alien falls within a category of aliens who should be detained.[12] In this case, the record of petitioner's conviction and the information supplied by petitioner to the INS officer when he sought

---

[12] The alien may appeal the District Director's detention decision to the BIA, however, and the BIA may elect to make a de novo determination whether the alien is in fact inadmissible, if the record will support such a determination. Cf. *In re Joseph*, Int. Dec. No. 3398, at 7-8 (B.I.A. May 28, 1999) (explaining BIA's role on INS's appeal from IJ's detention decision). In addition, if after the removal proceeding the IJ determines that the alien is not removable, the IJ may order the alien released from detention, subject to the INS's right to appeal to the BIA. See *id.* at 8.

to return to the United States facially indicated that petitioner was inadmissible, and therefore provided the INS with sufficient warrant to detain him pending the completion of his removal proceeding.

Petitioner, however, seeks to have the federal courts make a definitive determination *now* as to whether he is an "arriving alien" under the INA (or may be validly treated as such under the Constitution), even though his removal proceedings have not been completed. It is implausible that the Congress that enacted Section 1252 also intended that the federal courts would make such a determination while removal proceedings are still pending. If the courts were to determine, in the context of review of a detention decision, that as a matter of statutory or constitutional interpretation petitioner may not be treated as an arriving alien, then petitioner's removal proceeding would have to be terminated before its completion, because the same legal questions would govern petitioner's removability. In effect, petitioner's construction of Section 1252(b)(9) would allow aliens who are detained under Section 1226, pending the completion of their removal proceedings, to make collateral attacks on those proceedings. That construction is contrary to Congress's intent in Section 1252 to limit "the deconstruction, fragmentation, and hence prolongation of removal proceedings." *AADC*, 525 U.S. at 487.[13]

---

[13] Petitioner also argues (Pet. 21 & n.17) that the court of appeals' reading of Section 1252(b)(9) renders superfluous Section 1226(e), which separately precludes judicial review of the merits of the Attorney General's detention decisions. That argument is incorrect. The channeling of review in Section 1252(b)(9) precludes a district court (but not the court of appeals, on petition for review) from deciding, on habeas corpus, legal and factual questions that would bear on the merits of the alien's removal proceeding, even if they arise in the detention context. Section 1226(e) separately precludes judicial review by any court of detention decisions

c. Petitioner argues (Pet. 19-21) that the decision below conflicts with *Felker* v. *Turpin*, 518 U.S. 651 (1996), and *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), which disapproved repeals by implication of habeas corpus jurisdiction. That doctrine has no application to this case, for the ouster of the district courts' authority to entertain petitioner's claims is clear and express. As the court of appeals explained (Pet. App. 8-9), the "unmistakable zipper clause" of Section 1252(b)(9), displacing from the district courts all claims that might arise in a removal proceeding and channeling them to the courts of appeals, makes sufficiently clear that Congress has replaced review under 28 U.S.C. 2241 with another regime for review of all statutory and constitutional issues that arise in removal proceedings. Cf. *Swain* v. *Pressley*, 430 U.S. 372 (1977).[14] Section 1252(b)(9) does not refer to Section 2241 or to habeas corpus *in haec verba*, but this Court has never held that statutory recitation of certain

---

that might not bear directly on the alien's removability, such as whether the alien merits discretionary release on bond.

Moreover, not every claim concerning an alien's detention (even pending his removal proceeding) is necessarily shielded from review by either Section 1226(e) or Section 1252(b)(9). For example, a claim that mandatory detention under Section 1226(c) is facially unconstitutional is reviewable on habeas corpus. See *Parra*, *supra*. A claim that INS detention was based on a constitutionally impermissible factor such as race would also be reviewable on habeas corpus. Cf. *Jean* v. *Nelson*, 472 U.S. 846 (1985). Such claims do not go the merits of the alien's removal proceeding.

[14] In this respect, it is useful to contrast Section 1252 with old Section 1105a(a)(10), before it was amended by AEDPA. Before AEDPA, Congress had expressly preserved at least some access to habeas corpus in district court. See 8 U.S.C. 1105a(a)(10) (1994). In Section 401(e) of AEDPA, however, Congress repealed Section 1105a(a)(10), in a provision entitled "Elimination of Custody Review By Habeas Corpus." 110 Stat. 1268.

words is necessary to find a replacement of habeas corpus with another regime of judicial review.

Nor, contrary to petitioner's contention, does the court of appeals' construction of Section 1252 raise any serious issue under the Suspension of Habeas Corpus Clause. Petitioner argues (Pet. 23) that the Constitution requires that he have the opportunity to test the legality of his detention *before* completion of his removal proceeding. Thus, he maintains, he must be given the opportunity *now* to argue to the federal courts that he is not properly classed as an arriving alien. But as we have explained, the question for the INS in detaining petitioner at the commencement of his removal proceeding (and, therefore, the question whether petitioner's detention is proper) is not whether he is an inadmissible arriving alien but whether there is *reason to believe* that he is an inadmissible arriving alien. See pp. 22-23, *supra*. The INS clearly has reason to believe that petitioner is an inadmissible arriving alien, for petitioner was convicted of an offense that appears on its face to be an aggravated felony (indeed the IJ has concluded that it was an aggravated felony, see pp. 14-15, *supra*), and both the INA and the Attorney General's regulations on their face appear to require that a legal permanent resident alien convicted of an aggravated felony who seeks to return to the United States from abroad may be placed in detention, and that only the District Director has the authority to release him (subject to review by the BIA). See pp. 4-6, *supra*. This is not a situation in which the INS has detained someone wholly without warrant, or without any reason to believe that removal proceedings have been commenced against the alien on a proper basis.

3. Petitioner also seeks this Court's review (Pet. 25-30) of the merits of his claims that the INA and the Constitution prevent the Attorney General from treating him as an alien seeking admission to the United States, and denying him the

opportunity for a bond hearing before an IJ that is afforded lawful permanent resident aliens placed in removal proceedings in the United States. Because the court of appeals concluded in the decision under review that it lacked jurisdiction of this case, it did not reach the merits of those claims, and so this case would be an inappropriate vehicle for resolution of those claims.[15] Moreover, as we have explained, the court of appeals' jurisdictional ruling was correct. In any event, petitioner's claims are without merit.

Petitioner first argues, based on *Fleuti*, *supra*, and *Kwong Hai Chew* v. *Colding*, 344 U.S. 590 (1953), that the INS may not treat him differently than a lawful permanent resident alien who never left the United States, and that he is therefore entitled to all the process afforded to such a lawful permanent resident alien. Neither *Fleuti* nor *Chew* held, however, that as a *constitutional* matter, Congress *must* afford lawful permanent resident aliens who are returning to the United States the same procedural rights afforded such aliens present here. In *Chew*, the Court held that a regulation permitting the detention and exclusion of aliens without any hearing did not apply to lawful permanent resident aliens returning to the United States. *Id.* at 602-603; see also *Landon* v. *Plasencia*, 459 U.S. 21, 31 (1982) (describing reasoning of *Chew*). The Court also stated in *Chew* that the alien was "entitled to due process without regard to whether or not, for immigration purposes, he is to be treated as an entrant alien, and we do not now reach the question whether he is to be so treated." 344 U.S. at 600. There is no dispute here, however, that petitioner is entitled to due process, even if he is treated as an arriving alien. See *Plasencia*, 459 U.S. at 31-33. The Constitution itself, however, does not

---

[15] The court did discuss the merits of those claims in its previous decision, but only in passing and in language that is clearly dictum. See Pet. App. 74-75.

prevent either Congress or the INS from treating even lawful permanent resident aliens returning to the United States differently from those placed in deportation proceedings here, as long as they are afforded due process.

Fleuti also was not a constitutional holding. See 374 U.S. at 451 (addressing statutory question to avoid constitutional issue reached by lower court). There, the court concluded that the INA's definition of an alien seeking to make an "entry" into the United States did not reach a permanent resident alien who had left the United States briefly but had no "intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence." *Id.* at 462. *Fleuti*, however, was superseded as a matter of statutory interpretation in IIRIRA, which abolished the "entry" doctrine and replaced it with the concept of "admission." Moreover, IIRIRA expressly provided that a lawful permanent resident alien who had been convicted of an offense covered in Section 1182(a)(2), and who left the United States and sought to return, should be treated as an alien seeking admission. See *Collado*, *supra*, Int. Dec. No. 3333, at 5-6. Nor can there be any question of Congress's constitutional authority to classify such an alien as one seeking admission, as long as the alien is provided due process in his removal proceeding when he seeks to return. See *Plasencia*, 459 U.S. at 31.

The procedures surrounding the District Director's decision to detain or release an alien such as petitioner comport with constitutional requirements. The District Director first determines, as we have explained (p. 22, *supra*), whether the INS has "reason to believe" that the alien is inadmissible as an arriving alien convicted of an offense covered by Section 1182(a)(2). See IIRIRA § 303(b)(3)(A)(ii), 110 Stat. 3009-587. That decision can be made on the basis of a review of the records of petitioner's conviction. In addition, the District Director may release the alien only if the alien establishes

that he "will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." See IIRIRA § 303(b)(3)(B)(i), 110 Stat. 3009-587. Due process does not require that such a determination be made by an IJ after taking oral testimony. The District Director can consider any information brought to his attention by the alien. The alien may also appeal the District Director's detention decision to the BIA, which is independent of the INS.[16]

We also observe that the only court of appeals that has addressed the matter has upheld *mandatory* detention under Section 1226(c) of certain aliens, including those (like petitioner) charged with removal based on an aggravated felony conviction. See *Parra*, 172 F.3d at 958. An alien found removable based on an aggravated felony conviction is ineligible for discretionary cancellation of removal. See 8 U.S.C. 1229b(a)(3) (Supp. IV 1998). As the court observed in *Parra*, "[b]efore the IIRIRA bail was available to [aliens] as a corollary to the possibility of discretionary relief from

---

[16] Petitioner's attempt (Pet. 26-27) to rely on *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1950), falls wide of the mark. In that case, the Court held that Congress had required that deportation hearings conform to the provisions of the Administrative Procedure Act (APA) requiring separation of prosecutorial and adjudicative functions. That case involved a hearing on the merits of the deportation charge, not a decision on the question whether the alien should be held in interim detention. Moreover, that decision was superseded by the Immigration and Nationality Act of 1952, which made the APA's separation-of-functions provision inapplicable to deportation hearings, and permitted a " 'special inquiry officer' to take the dual role of prosecutor and hearing officer," subject to the supervision of the INS District Director. See *Marcello* v. *Bonds*, 349 U.S. 302, 305 (1955); see also *id.* at 311 (upholding that practice against due process challenge). Finally, the alien can appeal the District Director's detention decision to the BIA, which is independent of the INS. That avenue of appeal ensures that the alien has access to whatever standards of impartiality might be required by the Constitution.

deportation; now that this possibility is so remote, so too is any reason for release pending removal." *Parra*, 172 F.3d at 958. But if the Constitution does not require that an alien charged with removal based on an aggravated felony conviction be given individualized consideration *at all* of a request for release pending the outcome of his removal proceeding (since mandatory detention of such an alien is constitutional), *a fortiori* it does not require that any such individualized consideration that is available be assigned to an IJ rather than the District Director, with review by the BIA. And the Constitution permits Congress to authorize detention, pending removal, of aliens based on the particular charge of removability against the alien, without the need for a factual showing that a particular alien who falls within that class would either fail to appear for the removal hearing or would cause specific harm to the community if released. See *Carlson* v. *Landon*, 342 U.S. 524, 534, 541 (1952).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Acting Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
ERNESTO H. MOLINA, JR.
Attorneys

FEBRUARY 2000

APPENDIX

U.S. Department of Justice
Immigration and Naturalization Service **Notice to Appear**

In removal proceedings under section 240 of the Immigration and Nationality Act

File No: *A 17 566 876*

In the Matter of:

Respondent: *RICHARDSON, RALPH* currently residing at: *[REDACTED]*
(Number, street, city, state, and ZIP code)
[REDACTED]
(Area code and phone number)

☒ 1. You are an arriving alien.

☐ 2. You are an alien present in the United States who has not been admitted or paroled.

☐ 3. You have been admitted to the United States, but are deportable for the reasons stated below.

The Service alleges that you:

1. Are not a citizen or national of the United States.

2. You are a native of HAITI and a citizen of HAITI.

SEE CONTINUATION FORM I-831 ATTACHED

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

SEE CONTINUATION FORM I-831 ATTACHED

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution.

☐ Section 235(b)(1) order was vacated pursuant to:

☐ 8 CFR 208.0(f)(2) ☐ 8 CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at: KROME NORTH SPC, 18201 SW 12TH ST., MIAMI, FL 33191

(Complete Address of Immigration Court, Including Room Number, if any)

on TO BE SET at _____ to show why you should not be
(Date) (Time)
removed from the United States based on the charge(s) set forth above.

/s/ FELICIA SKINNER, SOI
FELICIA SKINNER, SOI
(Signature and Title of Issuing Officer)

MIAMI, FL
(City and State)

Date: OCTOBER 26, 1997

See reverse for important information

U.S. Department of Justice
Immigration and Naturalization Service

Continuation Page for Form I-862

Alien's Name	File Number	Date
RICHARDSON, RALPH	A 17 566 876	OCTOBER 26, 1997

ALLEGATIONS CONTINUED:

3. You applied for admission to the United States on 10/26/97 at MIA-IAP as a returning permanent resident.

4. At the time of your application for admission the consular or immigration officer had reason to believe that you were or had been an illicit trafficker of a controlled substance, or were or had been a knowing assister, abettor conspirator, or colluder with other in the illicit trafficking of a controlled substance, to wit: you were convicted on 7/3/91 of conspiracy to traffick cocaine and sentenced to 5 yrs. with 3 yrs. served.

5. You admitted committing the following acts: possession of marijuana, loitering and prowling, eluding police, and probation violation for which you were returned to jail to serve the remainder of your 5 year sentence.

6. Those acts constitute the essential elements of crimes involving moral turpitude.

PROVISIONS CONTINUED:

Section 212(a)(2)(C) of the Immigration and Nationality Act, as amended, as an alien who the consular or immigration officer knows or has reason to believe is or has been an illicit trafficker in a controlled substance, or knows or has reason to believe is or has

been a knowing assister, abettor, conspirator, or colluder in the illicit trafficking of a controlled substance.

Section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, as amended, as an alien who has been convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude (other than a purely political offense).

Section 212(g) (2)(A)(i)(II) of the Immigration and Nationality Act, as amended, as an alien who has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of, a violation or a conspiracy or attempt to violate any law or regulation of a state, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802.

Section 212(a)(2)(B) of the Immigration and Nationality Act, as amended, as an alien who has been convicted of two or more criminal offenses for which the aggregate sentences to confinement actually imposed were five years or more.

Signature	Title
ILLEGIBLE	IMMIGRATION INSPECTOR

[Seal Omitted]

United States Department of Justice
Immigration and Naturalization Service

Krome Service Processing Center
18201 SW 12 Street
Miami, Florida 33194

December 04, 1997

Kurzban Kurzban Weinger and Tetzeli, P.A.
Plaza 2650
2650 SW 27 th Avenue
Second Floor
Miami, Florida 33133

RE: Ralph RICHARDSON
A 17 566 876

Dear Mr. Kurzban, ESQ

This responds to your letter of November 13, 1997, requesting parole for the above named person, who is detained in Service custody. Please be advised that, after careful review and consideration, parole will not be extended to this individual at this time.

The detention of persons not clearly admissible to the United States is mandated by Section 235(b) of the Immigration and Nationality Act. The factors to be weighed by the District Director in evaluating requests for release from detention are set forth at Title 8, Code of Federal Regulations, part 212.5(a). After taking these factors into consideration in reviewing the parole request for the above applicant, I have concluded that a

favorable exercise of discretion is not warranted. Accordingly, the request for parole is hereby denied.

Sincerely,

/S/ CARYL THOMPSON
FOR THE DISTRICT DIRECTOR
Caryl Thompson
Acting Officer in Charge
Krome SPC

[Seal Omitted]

Memorandum

United States Department of Justice
Immigration and Naturalization Service
18201 S.W. 12 th. Miami, Fla. 33194

December 4th, 1997

Kurzban Kurzban Weinger and TetzelO, P.A.
Plaza 2650
2650 SW 27th Avenue, Second Floor
Miami, Florida 33133

RE: RALPH RICHARDSON, A17 566 876
SUPPLEMENT TO PAROLE REQUEST DENIAL LETTER

Dear Mr. Kurzban,

This letter is a supplement to the parole denial letter, which was mailed to your office on December 4th, 1997. The parole of aliens into the United States is justified only on a case by case basis for urgent humanitarian reasons or significant public benefit.

On October 26th, 1997, Mr. Richardson applied for admission as a returning permanent resident with an expired I-151 (Alien Resident Card) and a valid Haitian passport. This caused him to be referred to the Secondary Immigration Inspector for a more detailed interview on his application for admission. During this secondary interview, Mr. Richardson freely admitted to having been convicted of conspiring to traffick cocaine for which he was sentenced to five years imprisonment, of which he served three years. Subsequent to his admission of being convicted of a serious drug offense,

Mr. Richardson provided other information pertaining to his criminal history. In 1984 he was arrested and charged with possession of a firearm. He was again, in 1985, arrested and charged with possession of a controlled substance (marijuana). In 1992 and 1993 he was arrested and convicted of possession of a controlled substance (crack cocaine). Pursuant to Section 101 (a) (43) of the Immigration and Nationality Act, Mr. Richardson has been convicted of an aggravated felony.

The release of Mr. Richardson into the community will be of no significant public benefit. Mr. Richardson has not shown that his release would be warranted based upon urgent humanitarian reasons. Additionally, he is not eligible for any form of relief under the Immigration and Nationality Act. Consequently, he would have no incentive to appear for Immigration hearings.

Based on the above facts and circumstances of your client's case, a favorable exercise of discretion is not warranted at this time. Accordingly, the request for parole submitted on behalf of Mr. Richardson is denied.

Respectfully,

/s/ CHARLENE MONROE
CHARLENE MONROE
FOR THE DISTRICT DIRECTOR
Charlene Monroe
Acting Officer in Charge
Krome Service Processing Center

IMMIGRATION COURT
18201 S.W. 12TH ST
MIAMI, FL 33194

In the Matter of

Case A17-566-876

RICHARDSON, RALPH
Respondent IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 1/8/1998

This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or re-opened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to Haiti

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to alternative to

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $ _____ with an alternate order of removal to

[ ] Respondent's application for asylum was ( ) granted ( )denied ( )withdrawn.

[ ] Resepondent's application for withholding of removal was ( )granted ( )denied ( )withdrawn.

[X] Respondent's application for cancellation of removal under section 240A(a) was ( )granted (X)denied ( )withdrawn. Statutorily ineligible

[ ] Respondent's application for cancellation of removal was ( )granted under section 240A(b)(1) ( )granted under section 240A(b)(2) ( )denied ( )withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for a waiver under section ____ of the INA was ( )granted ( )denied ( )withdrawn or ( )other.

[ ] Respondent's application for adjustment of status under section _____ of the INA was ( )granted ( )denied ( ) withdrawn. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a ____ until _____.

[ ] As a condition of admission, respondent is to post a $_____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[X] Other: 212(a)(2)(C), 212(a)(A)(i)(II), 212(a)(2)(A)(i)(I).

Date:

Appeal: ~~WAIVED~~ Appeal By Respondent Due By: 2/9/98

\s\ KENNETH S. HUREWITZ
KENNETH S. HUREWITZ
Immigration Judge

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A17 566 876 – Krome Date: MAY 5 1999

In re: RALPH RICHARDSON

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Helena Tetzeli, Esquire
Kurzban, Kurzban, and Weinger, P.A.
2650 SW 27th Street, 2nd Floor
Miami, Florida 33133

ON BEHALF OF SERVICE:

Elena R. Stinson
Assistant District Counsel

CHARGE:

Notice: Sec. § 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. 1182(a)(2)(A)(i)(I)]—Crime involving moral turpitude

Sec. 212(a)(2)(A)(i)(II), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(II)]—Controlled substance violation

Sec. 212(a)(2)(B), I&N Act [8 U.S.C. § 1182(a)(2)(B)]—Multiple criminal convictions

Sec. 212(a)(2)(C), I&N Act [8 U.S.C. § 1182(a)(2)(C)]—Controlled substance trafficker

APPLICATION: Termination; cancellation of removal

The respondent timely appeals the Immigration Judge's decision finding him inadmissible and ordering him removed from the United States. The respondent also appeals the Immigration Judge's decision pretermitting his application for relief from removal under section 240A of the Immigration and Nationality Act, 8 U.S.C. § 1229b. The appeal will be sustained in part and the record remanded. The respondent's request for oral argument is denied.

I. BACKGROUND

The respondent is a native and citizen of Haiti. The respondent was admitted for lawful permanent residence on January 21, 1968 (Tr. at 20). The record reflects that on July 3, 1991, the respondent was convicted in the Circuit Court, First Judicial Circuit of Escambia County, Florida for trafficking in cocaine in violation of section 893.135(1)(b)(3) of the Florida statutes (1990)[1]. The respondent was sentenced to 5 1/2 years imprisonment for this offense.

On October 26, 1997, after a visit to Haiti, the respondent was detained by the Immigration and

---

[1] The Immigration and Naturalization Service alleges in the Notice to Appear (Form I-862) that the respondent was convicted of conspiracy to traffic in cocaine. The record of conviction indicates that the respondent was convicted under section 893.135(1)(b)(3) of the Florida Statutes (1991). The section for conspiracy is under section 893.135(5) of the Florida Statutes. The record of conviction contains no indication that the respondent's conviction was for conspiracy.

Naturalization Service while applying for admission. The respondent was issued a Notice to Appear (Form I-862) and placed in removal proceedings. The Service alleges that the respondent is inadmissible under section 212(a)(2)(C) of the Act, 8 U.S.C. § 1182(a)(2)(C), because there is reason to believe that he is a controlled substance trafficker. The respondent is also alleged to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act, as an alien who has committed a crime involving moral turpitude, section 212(a)(2)(B) of the Act as an alien who has multiple convictions whose aggregate sentences to confinement are 5 years or more, and section 212(a)(2)(A)(i)(II) of the Act, as an alien who has been convicted of a controlled substance violation. The Immigration Judge found that the respondent was an alien seeking admission and sustained all the grounds of inadmissibility except for the multiple convictions ground under section 212(a)(2)(B) of the Act. Finding that the respondent's conviction was an aggravated felony, the Immigration Judge pretermitted the respondent's application for cancellation of removal. The respondent has appealed the Immigration Judge's decision to this Board.

II. THE RESPONDENT'S ARGUMENTS ON APPEAL

The respondent asserts on appeal that the Immigration Judge erred in finding that he was an alien seeking admission under section 101(a)(13) of the Act, 8 U.S.C. § 1101(a)(13), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of the Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act for 1997, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-575 ("IIRIRA"). The respondent maintains

that under the doctrine established by the United States Supreme Court's decision in *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), he should not be regarded as making an "admission" into the United States. Alternatively, the respondent denied that he is inadmissible on the grounds alleged. The respondent maintains that the record of conviction submitted by the Service in support of the grounds of inadmissibility do not pertain to him. The respondent also argues that the record of conviction has not been properly authenticated pursuant to federal regulations, thus, is inadmissible as evidence of a conviction. Although the respondent concedes that he was convicted of possession of a controlled substance, he denies the allegation that he was convicted of trafficking in cocaine (Tr. at 24). Lastly, the respondent argues that he is statutorily eligible for cancellation of removal under section 240A(a) of the Act.

III. THE SERVICE'S ARGUMENTS ON APPEAL

In a short memorandum of law the Service adopts the Immigration Judge's decision. The Service maintains that the Board's decision in *Matter of Collado*, Interim Decision 3333 (BIA 1997), is controlling in this case. As such, the Service argues that the respondent is an arriving alien. The Service also argues that the record of conviction submitted by them in support of the allegations contained in the charging document meets the statutory and regulatory requirements for admissibility as proof of the respondent's criminal conviction.

IV. ANALYSIS

Despite his prior admission for permanent residence the respondent in this case has the burden of proving

that he is "clearly and beyond doubt entitled to be admitted into the United States and is not inadmissible under section 212." *See* section 240(c)(2)(A) of the Act, 8 U.S.C. § 1229a(c)(2)(A); 8 C.F.R. § 240.8(b); *see also, Matter of Rosas*, Interim Decision 3384 (BIA 1999). We find that the respondent in this case has failed to sustain that burden.

A. *Admissibility of the record of conviction*

The record of conviction submitted by the Service in this case indicates that a person named Ralph R. Richardson was convicted on July 3, 1991, of trafficking in cocaine. The respondent argues that this record of conviction does not relate to him (Respondent's Br. at 5). The respondent, whose name is Ralph Richardson, alleges that he has no middle name or initial. The respondent admits to a controlled substance conviction but maintains that it was for possession, not trafficking.

Where a deportation charge is based on documentary evidence bearing a name identical to that of a respondent, a reasonable inference may be made that such evidence relates to that respondent. *See Matter of Leyva*, 16 I&N Dec. 118, 121 (BIA 1977) (finding that a record of conviction that has a different first and middle name but the same last name is sufficient to establish that the record pertains to the respondent); *Matter of Lopez*, 15 I&N Dec. 183, 184 (BIA 1975) (where the names of the respondent and the person whose record of conviction is introduced into evidence are identical an inference may be drawn that the documents relate to the respondent, absent evidence to the contrary). The record of conviction in this case contains the respondent's first and last name. The respondent admitted to being arrested and charged in 1991. The respondent

admits that this arrest was for a controlled substance offense (Tr. at 22). The respondent also admitted pleading nolo contendere before Judge Bell in a criminal court in Escambia County, Florida (Tr. at 24-25). We note that all this information is reflected in the record of conviction submitted by the Service. Moreover, in a sworn statement made by the respondent to an immigration officer he admits to being convicted of a controlled substance offense (Exh. 3). Therefore, despite his assertions to the contrary the respondent has failed to provide any evidence that the record of conviction does not pertain to him. In light of all the evidence contained in the record we sustain the Immigration Judge's conclusion that the record of conviction for Ralph R. Richardson relates to the respondent.

The respondent also asserts that the record has not been properly certified as required under 8 C.F.R. §§ 287.6 and 3.41. As a result, the respondent argues that the record of conviction is not admissible to establish inadmissibility under the Act. The record of conviction contained in this case is a four page document. The last page contains a certification stamp, a raised seal of the court embossed over the certification, and a signature by the clerk for the Escambia Circuit and County Court (Exh. 2). Section 240(c)(3)(B)(vi) of the Act, 8 U.S.C. § 1229a(c)(3)(B)(iv), allows for any "document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction" to be used as proof of a criminal conviction in immigration proceedings. Although 8 C.F.R. § 287.6 requires that such records be certified, there is no requirement that the certification be placed on any particular page in the record. The record of conviction in this case is in

chronological order with each page numbered. There is no indication that anything has been altered or is missing from the record. As such, we find that the copy of the respondent's record of conviction has been properly attested to by an official having legal custody of that record and is admissible to support the grounds of removal alleged in this case. *See* 8 C.F.R. § 287.6; *Matter of Lopez*, *supra*, at 184.

B. *Applicability of section 101(a)(13) of the Act*

We reject the respondent's argument that under the doctrine established by the United States Supreme Court's decision in *Rosenberg v. Fleuti*, *supra*, he should not be regarded as making an "admission" into the United States. In our published decision, *Matter of Collado*, *supra*, we noted that the immigration laws concerning entry were changed with the enactment of section 301(a) of the IIRIRA. Previous to this enactment, the term "entry" was defined at section 101(a)(13) of the Act, 8 U.S.C. § 1101(a)(13) (1994). However, by the time of the respondent's return to the United States on October 26, 1997, the term "entry" was no longer in effect. Instead, the term "entry" was repealed and in its place the terms "admission" and "admitted" were added.

Section 101(a)(13) of the Act, as amended by the IIRIRA, defines the terms "admission" and "admitted" with respect to an alien, as the lawful entry of an alien into the United States after inspection and authorization by an immigration officer. Section 101(a)(13)(C) of the Act regards aliens lawfully admitted for permanent residence in the United States as not "seeking an admission into the United States for purposes of the immigration laws" unless the alien has committed an

offense identified under section 212(a)(2) of the Act. An exception to this rule exists for aliens granted relief under section 212(h) or 240A(a) of the Act. *See Matter of Collado, supra.*

In *Collado* we held that the United States Supreme Court's decision in *Rosenberg v. Fleuti, supra* did not survive as a judicial doctrine after the enactment of the newly codified section 101(a)(13) of the Act. This Board further held that a lawful permanent resident of the United States described in sections 101(a)(13)(C)(i)-(iv) of the Act was to be regarded as an alien seeking admission into the United States, without further inquiry into the nature and circumstances of a departure from and return to this country. *See Matter of Collado, supra.*

While the respondent's appeal was pending, the United States District Court for the Southern District of Florida granted a petition for habeas corpus filed by the respondent addressing the unrelated issue of custody. *See Richardson v. Reno*, 994 F. Supp. 1466 (S.D. Fl. 1998). In its decision, the Federal District Court rejected this Board's reasoning in *Matter of Collado, supra*, and held that the United States Supreme Court's decision in *Rosenberg v. Fleuti supra*, was applicable to this case. *See Richardson v. Reno, supra* at 1472. The respondent on appeal reiterates this argument. In support of his contention the respondent has included a copy of the District Court's decision.

We are not persuaded by the respondent's submission of the District Court's decision rejecting our holding in *Matter of Collado.* The United States Court of Appeals for the Eleventh Circuit has recently reversed and vacated that decision. In a panel decision

the Eleventh Circuit held that the District Court lacked jurisdiction to hear the respondent's habeas corpus claim inasmuch as the IIRIRA repealed habeas jurisdiction over immigration proceedings. *See Richardson v. Reno*, 162 F.3d 1338 (11th Cir. 1998). Therefore, our decision in *Matter of Collado* is still applicable in this jurisdiction and this Board is not collaterally estopped from applying its reasoning to the present case. *See Palciauskas v. INS*, 939 F.2d 963 (11th Cir. 1991) (applying the doctrine of collateral estoppel to immigration proceedings); *see also, Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993) (the Board of Immigration Appeals is not bound to follow the published decision of a United States District Court in cases arising within the same district).

The record reflects that the respondent has been convicted of a controlled substance offense involving cocaine. The respondent is, therefore, inadmissible under an offense defined in section 212(a)(2). In light of these facts we find that the respondent is to be regarded as seeking an admission to the United States for purposes of the immigration laws without further inquiry into the nature and circumstances of his departure and return to this country. *See* section 101(a)(13)(C)(v) of the Act; *Matter of Collado, supra.*

C. *Cancellation of Removal*

Lastly, we turn to the respondent's arguments regarding his statutory eligibility for cancellation of removal pursuant to section 240A(a) of the Act. Section 240A(a) of the Act provides that a lawful permanent resident may seek cancellation of removal if he (1) has been an alien lawfully admitted for permanent residence for not less than 5 years; (2) has resided in the

United States continuously for 7 years after having been admitted in any status; and (3) has not been convicted of any aggravated felony. *See Matter of C-V-T-*, Interim Decision 3342 (BIA 1998).

The Immigration Judge determined that the respondent's controlled substance conviction was an aggravated felony and pretermitted his application for cancellation of removal (I.J. at 7-8). The respondent, however, argues that since his criminal conviction pre-dated the effective date of the IIRIRA, it cannot be used to bar his eligibility under the Act.

We find that the record contains insufficient evidence to support a finding that the respondent had been convicted of an aggravated felony. We, therefore, need not reach the merits of the respondent's argument on the temporal scope of the aggravated felony bar to relief from removal under Section 240A(a) of the Act.

Section 101(a)(43)(B) of the Act includes in the definition of aggravated felony the "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)." In determining whether a state drug offense qualifies as an aggravated felony under section 101(a)(43)(B) of the Act, this Board has essentially established a two-pronged test. *See Matter of L-G-*, Interim Decision 3254 (BIA 1995). Under the first prong, a state drug offense is an aggravated felony if it is a felony under state law and has a sufficient nexus to unlawful trading or dealing in a controlled substance to be considered "illicit trafficking" as commonly defined. *Matter of L-G- supra.* The second prong of the test, requires that a state drug offense qualify as a "drug trafficking crime" under 18 U.S.C. § 924(c)(2),

punishable as a felony under the Controlled Substance Act (21 U.S.C. § 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.). *See Matter of L-G-, supra; Matter of Davis*, 20 I&N Dec. 536 (BIA 1992); *Matter of Barrett*, 20 I&N Dec. 171 (BIA 1990).

In this case, the respondent was convicted under section 893.135(1)(b)(3) of the Florida Statutes. Section 893.135(1)(b)(3) requires that a criminal defendant knowingly sell, purchase, manufacture, deliver, or bring into the state, or knowingly be "in actual or constructive possession of, 28 grams or more of cocaine as described in section 893.03(2)(a)(4)" or of any other mixture containing cocaine. We note that the statute under which the respondent was convicted is divisible; meaning it encompasses offenses that include drug trafficking as defined under section 101(a)(43)(B) of the Act, as well as offenses that do not. *See Matter of Teixeira*, Interim Decision 3273 (BIA 1996) (divisibility analysis applied to firearms); *Matter of Short*, 20 I&N Dec. 136 (BIA 1989) (divisibility analysis applied to crimes involving moral turpitude); *Matter of Mena*, 17 I&N Dec. 38 (BIA 1979) (divisibility analysis applied to controlled substance offenses). For example, a criminal defendant may be convicted under section 893.135(1)(b)(3) for selling, purchasing, manufacturing, or delivering cocaine. All of these offenses would constitute an aggravated felony under the Act under either prong of *Matter of L-G-, supra*. However, the statute also criminalizes being in actual or constructive possession of 28 grams or more of cocaine. To prove a defendant was in "constructive possession" of cocaine, all that is needed under Florida law is proof that the defendant had dominion and con-

trol over the cocaine, knew it was within his presence, and had knowledge of its illicit nature. *See Green v. State*, 667 So.2d 208 (Fla. Dist. App. 1995). Possession of a controlled substance lacks a sufficient nexus to unlawful trading or dealing in a controlled substance to be considered "illicit trafficking" as commonly defined. *Matter of L-G- supra.* Thus, the first prong of *Matter of L-G-* is not satisfied. Unless a respondent has had prior drug convictions, possession of more than 5 grams of a mixture or substance which contains "cocaine base" is the sole possession offense under 21 U.S.C. § 844(a) which is punishable as a felony. *Id.*

Where a statute under which an alien was convicted is divisible, we look to the record of conviction, and to other documents admissible as evidence in proving a criminal conviction, to determine whether the specific offense for which the alien was convicted will sustain a ground of inadmissibility. This approach does not involve an inquiry into facts previously presented and tried. Instead the focus is on the elements required to sustain the conviction. *See Matter of Pichardo*, Interim Decision 3275 (BIA 1996).

Looking to the record of conviction in this case we note that there is no indication of what specific crime under section 893.135(1)(b)(3) the respondent was convicted of committing. There is nothing in the record indicating that the respondent's single drug conviction under Florida law involved cocaine base. There is, likewise, no evidence that the respondent's conviction was for selling, purchasing, manufacturing, or delivering cocaine[2]. Therefore, on this record we cannot find

---

[2] We note that the record of conviction does state that the respondent was convicted of "trafficking" in cocaine. However, sec-

that his offense is analogous to a felony under the Controlled Substance Act. *See Matter of Batista-Hernandez*, Interim Decision 3321 (BIA 1997). In light of these facts we find that the respondent's conviction cannot be construed as an aggravated felony as defined under section 101(a)(43)(B) of the Act. We note that the respondent consistently maintained that he was convicted of possession. The record of conviction provides no information that refutes his contention.

We recognize that the United States Court of Appeals for the Eleventh Circuit has recently held that a felony conviction for possession of a controlled substance is an aggravated felony. *See United States v. Simon*, 168 F.3d 1271 (11th Cir. 1999) (rejecting argument that a state drug offense must be classified as a felony by the Controlled Substance Act). However, we note that *Simon* involved the term aggravated felony as used in U.S.S.G. §2L1.2(b)(1)(A) (1997) and not the Immigration and Nationality Act. Moreover, we note that the Eleventh Circuit adopted the approach taken by the First Circuit in *United States v. Restrepo-Aguilar*, 74 F.3d 361 (1st Cir. 1996) (term aggravated felony includes a state felony drug possession offense that would only be a misdemeanor under federal law), which rejected the reasoning of *Matter of L-G-*, *supra*, because the Board's reasoning was inconsistent with the Second Circuit's holding in *Jenkins v. INS*, 32 F.3d 11 (2d Cir. 1994) (alien's state conviction for a drug offense that is a felony under state law, but a misdemeanor under federal law, qualifies as a conviction for an aggravated felony). The Second Circuit, however,

---

tion 893.135(1)(b) labels the actual or constructive possession of cocaine as a "trafficking" offense.

has since vacated its holding in *Jenkins*. *See Aguirre v. INS*, 79 F.3d 315 (2d Cir. 1996). Since the Eleventh Circuit has not issued a decision rejecting our interpretation of section 101(a)(43)(B) of the Act, as articulated in *Matter of L-G-*, *supra*, and cases cited therein, we decline to follow precedent that interprets the Sentencing Guidelines and not the Immigration and Nationality Act.

The respondent was admitted as a lawful permanent resident to the United States in 1968. There is no indication in this record that the respondent has failed to reside continuously in the United States since that time. Consequently, upon the evidence contained in this record we find that the respondent is currently statutorily eligible for cancellation of removal under section 240A(a) of the Act.

V. CONCLUSION

We sustain the Immigration Judge's determination that the respondent is inadmissible under section 212(a)(2)(A)(i)(II) of the Act, as a controlled substance offender. However, in light of our determination that the respondent's criminal conviction may or may not be a controlled substance trafficking offense, we decline to sustain the Immigration Judge's decision finding the respondent inadmissible under sections 212(a)(2)(C) and 212(a)(2)(A)(i)(I) of the Act. Since the statute under which the respondent was convicted is divisible, we likewise cannot find that the respondent's criminal offense constitutes a drug trafficking crime under section 101(a)(43)(B) of the Act. We note that on remand the Service is not precluded from introducing evidence establishing that the respondent has indeed been convicted of illicit trafficking in a controlled substance

and is, thus, deportable as an alien convicted of an aggravated felony after admission. However, as the record currently stands, the respondent is statutorily eligible to apply for cancellation of removal pursuant to section 240A(a) of the Act. Accordingly, the following order shall be entered.

ORDER: The respondent's appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for entry of a new decision.

ILLEGIBLE SIGNATURE
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Miami Florida

A 17-566-876

IN THE MATTER OF: RICHARDSON, RALPH,
RESPONDENT

IN REMOVAL PROCEEDINGS

[Jun. 8, 1999]

ORDER

The Court finds pursuant to the Board of Immigration Appeals decision, dated May 5, 1999, that the respondent is statutorily eligible to apply for Cancellation of Removal pursuant to section 240A(a) of the Act.

This relief is discretionary and a hearing will be held on July 19, 1999, at 9:00 a.m.

Dated: June 8, 1999

\s\ KENNETH S. HUREWITZ
KENNETH S. HUREWITZ
U.S. Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
KROME SERVICE PROCESSING CENTER
MIAMI, FLORIDA

A17-566-876

IN THE MATTER OF: RICHARDSON, RALPH,
RESPONDENT

IN REMOVAL PROCEEDINGS

ON BEHALF OF THE RESPONDENT:

Helena Tetzeli Esquire
2650 S.W. 27th Ave 2nd Floor
Miami, Florida 33133

ON BEHALF OF THE SERVICE

Loren Coy Esquire
Assistant District Counsel
Miami, Florida

Charges:

Section 212(a)(2)(C) of the Immigration and Nationality Act, as amended, as an alien who the consular officer or Immigration officer knows or has reason to believe is or has been an illicit trafficker in a controlled substance or knows or has reason to believe is or has been an assister, aider, abettor, colluder, conspirator, in the illicit trafficking of a controlled substance.

Section 212(a)(2)(A)(i)(I) of the Act, as an alien who has been convicted of or admits having committed or admits committing acts which constitute essential elements of a crime involving moral turpitude other than a purely political offense.

Section 212(a)(2)(A)(i)(II) of the Act, as an alien who has been convicted of or admits having committed or admits committing acts which constitute the essential elements of a violation or a conspiracy to violate any law or regulation of a state, the United States or a foreign country relating to a controlled substance.

Section 212(a)(2)(B) of the Act, as an alien convicted of two or more criminal offenses for which the aggregate sentence to confinement actually imposed was five years or more.

Section 212(a)(6)(C)(i) of the Act, in that you are an alien who, by fraud or willfully misrepresenting a material fact seeks to procure or has sought to procure or has procured a visa or other documentation or admission into the United States or other benefit under the Act.

APPLICATIONS:

Termination

Cancellation of Removal pursuant to section 240A(a) of the Act.

DECISION OF THE IMMIGRATION JUDGE

The respondent, a native and citizen of Haiti, who was first admitted to the United States as a permanent

resident on January 21, 1968 at age two. On October 26, 1997, the respondent was returning to the United States as a returning resident. At that time, the Service stopped him and held him in custody issuing an NTA on October 26, 1997, charging him with inadmissibility as charged above, other than section 212(a)(6)(C)(i), which was added subsequently. At a hearing before the undesigned, the respondent, through counsel, conceded that he was a native and citizen of Haiti, not a citizen of the United States, that he was a permanent resident, that he was returning to the United States on that date. Counsel denied the conviction, and also denied that he should be considered an arriving alien.

On January 8, 1998, this Court found the respondent to be inadmissible and statutorily ineligible for cancellation of removal, and ordered him removed from the United States. The Board of Immigration Appeals, in a decision dated May 5, 1999, found the respondent to be an arriving alien, subject to removal only under section 212(a)(2)(A)(i)(II), for having been convicted of a drug offense. The Board also found the respondent not to be an aggravated felon, and, therefore, eligible for cancellation of removal, and remanded the case back to this Court. Since the Board ruled on the issue of entry, the Court will not address that issue in this decision. It was addressed in the Court's previous decision.

At the resumed hearing, counsel for the respondent made a motion that this Judge recuse himself because the Court's law clerk had been offered employment with the Service, at the completion of his clerkship. In the instant case the Court had not even reached a decision when the law clerk left, and he was not involved in

the final decision. A Judge should only recuse himself where there is a clear showing of personal bias or prejudice. *Matter of K-*, 5 I&N Dec. 347 (BIA 1953). There has been no such showing. There has been no showing that the law clerk was prejudice [*sic*] in favor of the Service based on his future employment. The motion to recuse must, therefore, be denied.

The Service on remand submitted additional evidence including a conviction for loitering and prowling, and carrying a concealed weapon, Remand ex. #18, to support a charge under section 212(a)(2)(B). Since the respondent was sentenced to more than five years in prison pursuant to his conviction for trafficking in cocaine, Remand ex. #6, he is inadmissible under section 212(a)(2)(B) of the Act. The Service withdrew the charge under section 212(a)(6)(C)(i) of the Act. The Service elected not to challenge the Board's ruling regarding respondent's inadmissibility pursuant to section 212(a)(2)(A)(i)(I) of the Act.

The Service introduced additional evidence pursuant to the Board's ruling, to support their position that the respondent was subject to removal under section 212(a)(2)(C), and was an aggravated felon, and, therefore, ineligible for cancellation of removal. The Board in their decision said, "We note that on remand the Service is not precluded from introducing evidence establishing that the respondent has indeed been convicted of illicit trafficking in a controlled substance and is, thus, deportable as an alien convicted of an aggravated felony after admission." This despite the fact that the respondent is an arriving alien, and is not subject to section 237 of the Act.

The Service first introduced conviction records, indicating a conviction for carrying a concealed firearm, and unlawful possession of cannabis, August 6, 1985, Remand ex. #19, and for unlawful sale of cannabis, August 13, 1986, Remand ex. #16. Respondent's counsel was given an opportunity to review these records and at a resumed hearing. On September 3, 1999, counsel submitted remand exhibits 16A, and 19A, judgements by the Circuit Court dated September 1, 1999, vacating these convictions.

The Service then introduced, the police report for the respondent's conviction for trafficking in cocaine, Remand ex. 20, indicating that the 581 grams of cocaine, for which he was convicted of was crack cocaine, a mixture containing cocaine base.

The Service called Larry Aiken, Deputy Sheriff, Escambia County, Florida as a witness. Mr. Aiken testified that he worked in the Narcotics Division July 1985 to October 1991, and then returned to the unit as Assistant Officer in Charge Narcotics Unit, December 1994. He was qualified as an expert in cocaine having attended DEA Drug Unit Commanders school. He worked with customs, DEA, and OCIDEF. Mr. Aiken identified the respondent, and, testified that he received information that cocaine was being brought into Pensecola Airport. He found 581 grams of crack cocaine with Mitchell Thevenin Remand ex. #5. Mr. Thevenin stated the Mr. Richardson had supplied the drugs. He obtained a warrant for Mr. Richardson's arrest, who lived in South Florida, Pembroke Pines. He was arrested on the warrant and transported to Pensecola.

At first Mr. Richardson was not cooperative, but the later cooperated, identifying Charles White as the person who was to receive the cocaine. He admitted that the cocaine seized from Thevenin had been supplied by him (Mr. Richardson). Mr. White was a major local supplier, and received a 15 year sentence for trafficking in cocaine. Mr. Richardson admitted to Mr. Aiken, that he had an ongoing relationship with Mr. White.

Mr. Aiken testified that he personally tested the drugs and it was crack cocaine. He also testified that this was a small town (1000 people), with a major drug problem.

Additionally, the Service introduced a deposition taken from Mr. Richardson, in Mr. White's case Remand ex. #9. In this deposition the [*sic*] Mr. Richardson said that he was born in Brooklyn, New York, Page 4 line 13, and that he used the name Richard, page 4 line 3. He went on to say that he had a previous arrest in Miami in 1986 for possession of marijuana for which he received probation, and a CCW in 1985 or 1986. (page 5). He then stated that he arranged for Mr. Thevenin to transport drugs to Pensecola for Mr. White. (Page 7). Mr. Richardson said that he obtained the drugs from different people, Stick a black male, and from some Cubans including Jose. He had no one in particular (page 8 lines 22, 23). He said that he received 17 or 18 oz. Of crack cocaine (page 9 lines 16-20). Mr. Thevenin made trips for him and received varying amounts of money depending on the quantity (pages 10 and 11). He then was questioned regarding who would have testified against him including Mr. Thevenin, and how he got arrested.

He then stated that he had not made a deal for his testimony, but hoped to get a break (page 20). He stated that he met Mr. White three years earlier through a woman named Paula Warrer, a girlfriend of Mr. White. He said that he was already involved in selling drugs, (page 22 lines 17-25). He starting bringing drugs to Pensecola in 1986 (page 23 line 5). He was a small dealer, 2 or 3 oz. at that time, and Paula told him that Mr. White could make him a lot of money (page 24). In 1989 he had about 5 or 6 oz. of crack cocaine worth about $6500 (page 26). He testified regarding other individuals. He testified that he derived his income from drugs from June 1989 to September 1990, based on up to 10 trips for Mr. White (page 38). He later said that there were other trips and that he earned $10,000 per trip and had no other income. On cross examination by the Service, he admitted the facts stated in his deposition and admitted to being a drug dealer.

AGGRAVATED FELONY ANALYSIS

In the Board's decision, page 7, they said, an alien convicted for possession is not an aggravated felon, "unless a respondent has a prior drug conviction, or possess more than 5 grams of a mixture containing crack cocaine."

Since respondent's counsel was able to vacate respondent's two prior drug convictions, he does not fall within the first provision as set out by the Board. The Service continues to argue that respondent's conviction is an aggravated felony because it involved more that 5 grams of crack cocaine, as evidenced by the police report and the testimony of Mr. Aiken. Respondent's counsel cites *Matter of Texeira*, I.D. 3273 (BIA 1996), and *Matter of Short*, 20 I&N Dec. 136 (BIA 1989), for

the proposition that a police report is not part of the record of conviction. The Court must agree that pursuant to *Matter of Texeira*, "the police report is not part of a record of conviction." The respondent's deposition in Mr White's case is also clearly not part of his record of conviction.

Since the Board's precedent does not allow this Court to use the above evidence to demonstrate that the respondent was convicted for trafficking in crack cocaine, the Court can not find that the respondent was convicted for an aggravated felony, based on possessing more than 5 grams of cocaine base.

The Court, however, does concur with the Service's position, as laid out in their brief accompanying their interlocutory appeal, that a trafficking in cocaine conviction based on possession in excess of a certain amount, clearly indicates that such possession was not for personal use. Federal Courts have held that intent to distribute drugs may be inferred solely from possession of a large quantity of a controlled substance. *U.S. v. Koua Thao*, 712 F.2d 369 (8th Cir. 1983), *U.S. v. DeLeon*, 641 F.2d 330 (5th Cir. 1981), *U.S. v. Edwards*, 602 F.2d 458 (1st Cir. 1979), *U.S. v. Love*, 599 F.2nd 107 (5th Cir) cert denied 444 U.S. 944 (1979).

Additionally, the Court believes that it is bound by the 11th Circuit's ruling in *United States v. Simon*, 168 F.3rd 1271 (1999). In this decision the Court found that a felony conviction under Florida law for possession of cocaine was an aggravated felony, as defined under 18 U.S.C. 924(c)(2). The Court specifically said, "the commentary to section 2L1.2(b)(1)(A) defines aggravated felony as it is defined in 8 U.S.C. 1101(a)(43)(B)." This section, 101(a)(43)(B) of the Act, includes any drug

trafficking crime as defined in section 924(c) of Title 18. While the Board and the Judge are not bound by circuit court decisions outside their jurisdiction, they are bound by the Circuit's decision which covers the jurisdiction of the hearing. The respondent has been convicted of an aggravated felony.

INADMISSABILITY UNDER SECTION 212(a)(2)(C) OF THE ACT

Section 212(a)(2)(C), states that one is subject to removal if an immigration officer knows or has reason to believe that an alien has been an illicit trafficker in any controlled substance or is or has been a knowing assister, abettor, conspirator, or colluder, with others in the illicit trafficking in any controlled substance.

A conviction is not required for such a finding, *Matter of Rico*, 16 I&N Dec. 181 (BIA 1977). In *Rico*, the applicant was not convicted for a drug offense, but the Board found reason to believe based on testimony and evidence. In the instant case the evidence, clearly establishes that the respondent was earning his living in the late 80's by selling crack cocaine in Florida. The respondent's own deposition, Remand ex. #9, establishes this fact. The testimony of Mr. Aiken, also, clearly satisfies the provisions of section 212(a)(2)(C) of the Act. In *Rico*, the Board said, "Unlike the criminal judicial proceeding where a defendant must be found guilty beyond a reasonable doubt, an administrative finding of excludability must be based upon reasonable, substantial, and probative evidence." The evidence, including his conviction for at least possessing 581 grams of cocaine, including crack, and his admissions relating to the selling of crack cocaine, demonstrates not only a reasonable belief that the respondent traf-

ficked in cocaine, but such belief is beyond a reasonable doubt.

The respondent is inadmissible pursuant to section 212(a)(2)(C) of the Act.

CANCELLATION OF REMOVAL

While the Court has found the respondent to have been convicted of an aggravated felony, and thus ineligible for cancellation of removal, a full hearing was held based on the Board's remand. The Court notes that the Board in its remand was aware of the 11th Circuits ruling in *Simon*, but did not follow it. After careful reading of that case, this Court feels that *Simon* is controlling. In order to avoid any future hearings, the Court will now address the issue of cancellation of removal assuming he is statutorily eligible for the relief.

Janice Richardson respondent's wife testified that she was born in Pensecola and met Mr. Richardson in 1988, marrying him January 15, 1991. They have one child together, Miriah, and he has one child, JoAnna, and she has one child, Chris. They all lived together. She did not know of his prior criminal record.

They moved to Atlanta in 1992 to change their life. He was arrested the second time for violation of probation in 1992, when they were visiting her mother in Pensecola for Thanksgiving. He was then sentenced to a term in prison. This changed her life, especially financially. She had to work two jobs, and the children were upset. Friends helped take care of the children. After his release things got better, and they lived a

normal family life. They played basketball and Thursday was family day, where they all did things together.

Ralph had a good relationship with Chris (stepson). Since the respondent's detention by the Service, Chris has suffered. His grades have slipped, and he does not want to participate in sports, where his father had been the coach. He hides under the desk, cries a lot, and secludes himself. Chris has visited his father about 3 times. He has gone to counseling, and the teachers know of his problems.

Chris wants to see his father, but he gets depressed afterwards, and it takes him time to get back into his routine. Her husband calls everyday to make sure the children go to school. She leaves at 5 AM to go to work. She can not afford things such as gymnastics and other activities. She did not have these problems when Ralph was home.

She now cleans buildings that Ralph used to do, as well as doing her other job. She does this twice a week. She also works for Family and Children Services as an administrator. They had a snow cone business but lost it when he was detained. She is in a bad financial situation, and is even behind on her mortgage payments.

Chris's father is not involved in his life. The only father Chris knows is her husband. Ralph has a good relationship with JoAnna. She now lives with her mother in Miami, because she can not take care of all the children. JoAnna wants to come home to Atlanta. She is very quiet and is upset about her father. Ralph always supported his daughter prior to being arrested. JoAnna went to school in Atlanta.

Miriah is young, cries ,and wants her father, but does not understand. She was upset when a bond was set by the Service, and then revoked. The whole family was upset as they were planning a get together when he was released.

In Atlanta they did everything together, including going to church. Ralph took care of the kids, as well as cleaning the house. He came home earlier than her, and helped out at home. It is terrible not having Ralph home. She is totally stressed and has no life. She had to give up basketball, including the possibility of playing in the WNBA with the Liberty. If Ralph were there she could have pursued this as he always supported her. She now has callouses on her hands because of hard work.

She would not go to Haiti with Ralph. Conditions are very bad in Haiti. She does not speak Creole, but while he does speak it, he does not speak it very well.

Ralph would help anyone in the community. He left in the middle of the night to help a stranded friend, and everyone loved him.

Ralph expressed remorse and cries saying he is sorry. He would not get involved in criminal activity again. He often complains about things at Krome, including his health.

If Ralph were deported she would not go on as today. She would move to Pensecola with her mother and would have to start over again. She considered suicide because of the stress, and also thought that maybe this would allow her husband to be released. While she considered divorce, she has not filed papers because she

wants to continue to live with him in the United States. She is aware of two arrests, although she does not know what happened in 1990, prior to their marriage. When they were dating she saw him about every three months, when he would come for a week.

She testified regarding his second arrest for violation of probation in 1992. She testified that they were leaving for Atlanta after Thanksgiving, from her sister's house in Pensecola. He took a friend Tony to his hotel, and then did not come back as he said he would. She drove by the hotel, but Tony was not there, although he did not check out. She then found out that Ralph has been arrested for fleeing the police. Her husband told her he knew nothing of the drugs in the car, although he fled. He fled when Tony said, "don't stop I have something in the car."

Ralph has no business office, and uses an answering service. He runs the business from his home. He has never had an office in Atlanta. She was shown a copy of a 1996 tax return that he submitted, Remand ex. #7. He filed as a head of household, address 2263 Comet Way, Atlanta, Georgia 30318. They never filed a joint return. She does not know where the above address is. She filed tax returns on her own using her home address. She files single claiming 2 children, Chris, and Miriah. She has not submitted any tax returns.

She married the respondent while in jail, and Miriah was born while he was in jail. Miriah was over one year old when he was released, in March 1992. He was working continuously prior to his detention by the Service.

The respondent called a friend, Rick Clark, as a witness. Mr. Clark has a designer jewelry business in Atlanta, Georgia, who hired Mr. Richardson to clean his business. Mr. Richardson originally worked for the prior contractor. When the contract expired, Mr. Richardson bid on the job and was hired. He knows Mr. Richardson since 1995. He believes that Mr. Richardson is a hard working, trustworthy, and highly motivated person. He knows of the respondent's other businesses including, his auto detailing business, snow cone business, and this executive cleaning business.

Although he did not know of the respondent's arrests, and may not have hired him, he does not regret his decision. Respondent's wife took over the cleaning of his offices, when the respondent was arrested. His detention by the Service created tremendous hardship for the family. He offered Janice, respondent's wife money, and she did accept a loan. The money was paid back. Janice and he have talked and she has unloaded her feeling with him.

On cross examination he testified that he learned of the respondent's arrest record only after he was detained by the Service. He had the contract for about 2 or 3 years. He pays $6000 per month and has 5000 square feet. He knows that respondent has other accounts including one of about 50,000 square feet. He learned of the respondent's criminal record for drugs, and firearms from Janice after his arrest by the Service. He was asked why, a recommendation he submitted, Remand ex. 12, only mentioned firearms. He stated that Janice did not originally tell him about the drug arrest. Respondent's criminal record came out piecemeal, when the respondent was not released by

the Service. He has never visited the respondent's house, and only knows that he lives in the Northern part of the city.

Respondent next called Mario Laurencau, his cousin who is Director Phoenix Clinic (nurse). He was Deputy General counsel for Haiti in Miami from May 1991 to August 1995. He does not know if respondent speaks Creole. He testified that the respondent has no family in Haiti. He stated that up to 1995 deportees to Haiti were detained on return, but were released. He lived with the respondent, while he was in school. He last saw the respondent about 4 years ago. He does not know the names of respondent's children, and does not know about his criminal record. He testified that he talks to Mr. Richardson about once a month at Krome.

The respondent then called Gerald Aquino, a United States citizen, who is married to Mr. Richardson's cousin. He helped the respondent move to Miami in 1982, and helped take care of his children. Mr. Aquino is an IRS Tax Revenue agent, and lives in Miramar, Florida. He knows the respondent very well. However, he only saw him a few times after respondent moved to Atlanta. He talked to him at Mr. Richardson's father's funeral. He testified that Mr. Richardson's children love him, but he has not talked to Mrs. Richardson or the children since respondent's detention. He knows that the respondent was arrested, and he believes it was for drugs. He thinks Mr. Richardson spent three years in jail. Respondent's parents had 9 children, and had financial problems. The respondent's aunt and uncle helped out. Respondent's mother had emotional problems, and could not take care of the children, so their aunt and uncle did. He last saw

respondent at his father's funeral. He never visited him in Georgia, or while detained. He was aware that the arrest was for crack cocaine, and knows that Mr. Richardson made a bad mistake. He testified that Mr. Richardson violated probation by being with someone he was not suppose to be with, and that he, therefore, fled the police.

He does not know what Mr. Richardson did for a living from 1988 to 1990. He believes, however, that Mr. Richardson is a good person, who made a mistake. He testified that he thinks respondent's brother Angel is addicted to drugs. He talked to respondent at Krome, and thinks he has changed.

He testified that Mr. Richardson had a car wash business in Atlanta. He saw a change in Mr. Richardson after his uncle's death in 1987. It was he uncle, Mr. Joseph, who helped support the family.

Karlie Richardson, respondent's sister then testified. She is 40 years old, lives in Boyton Beach, Florida, and is a property manager for HUD. She came with respondent to the United States, when she was 8 and he was 2. They were raised in Brooklyn, New York. She says that respondent did not know that he was born in Haiti. He graduated High School in Miami, having moved from New York at age 14. He came to live in Miami with his aunt and uncle because it was a good place to live. Their mother suffers from depression and slight retardation. Their parents moved to Florida in 1981 or 1982, but Ralph remained with his aunt of uncle. Their father had a stroke in 1982, and was in a nursing home for a long time before passing away about 1997. Mr. Richardson came to visit his father about once every 6 weeks while in Atlanta.

They are a close family, and although he is a younger brother, he is always there for her. He broke down and apologized to the family for what he had done. She knows he went to visit someone in Pensecola, when he violated probation, but he was there visiting his wife's parents. She speaks to him 3 times a week, and he is really depressed about his children, especially Chris. Mr. Richardson attends church.

James (Jimmy), respondent's younger brother goes to school in Georgia, and Ralph was like a father to him. When James was arrested for graffiti, Ralph disciplined him. She would be devastated if he were deported, because he is always there for her. He has no one in Haiti, and his Creole is very poor.

She speaks to his children and they are suffering. Chris is very withdrawn. JoAnna's grades went down. JoAnna now lives with her biological mother. Miriah always cries, and wants her daddy. His wife, Janice is stressed out and has to work 3 jobs. Chris who is 10 years old sometimes has to take care of Miriah. Their mother would go into depression if he were deported. He would be homeless in Haiti.

On cross examination she testified that her younger brother enrolled in college in Georgia, so that the respondent could help him. However, due to his detention by the Service, he has not been able to assist his brother.

She was naturalized because it was important to her, but no one told Ralph that he was not born in the United States. She worked for the Immigration Court as an interpreter, so she had to be a United States citizen. She does not approve of respondent's actions,

and she has not told her 12 year old son, about the respondent's criminal record.

She testified about her brother's activities in the 1990s, but did not know about the earlier arrests in 1984 and 1986. Ralph's criminal attorney explained everything about the case to her. She believes everyone makes mistakes and should be given another chance. He told her he would not do it again.

She knew about his violation of probation, but believes he was simply with someone who had drugs, and that he did not know about the drugs, and was not involved. He has changed and tells his children not to use drugs. He went to Haiti in 1997 for a mass in his father's memory. Ralph helped his family during his father's illness.

Chris, respondent's stepson then testified. He identified the respondent, and call him dad, and stated that he loves him and misses him. His father coached his basketball team and everyone on the team misses him. It is not fun to be in little league sports without his father.

His sister Guithele Ruiz testified. She is a Human Resource Director in Pembroke Pines. She has a good relationship with the respondent. Ralph has a good relationship with her children. He is a male role model for her son. He is a good father and husband. His parents were not told about the incident (arrest), because of their illness. Ralph came and apologized to his parents.

She takes respondent's daughter, Miriah to Krome to visit her father. When Miriah and Chris come to

Florida, Chris stays with her brother, Harvey, but she does not know if Chris comes to visit his father. Chris sometimes has to stay at home in Atlanta with his sister, when Jan is working. This is difficult. Mr. Richardson calls home in the morning to make sure that Chris and Miriah go to school, since Jan often leaves before the children.

Ralph has been a strong male figure and it would be devastating to his wife, children and mother if he were deported. Miriah is withdrawn without her father. JoAnna is talking with older men, something she would not do if Ralph were there. Chris (Jan's son) was out of control before Ralph entered the scene. He listens to Ralph, who is the only father he knows. She has never seen Chris's real father. Ralph would have nobody in Haiti, and would not be able to take care of himself.

She has worked for the Florida Voluntary Action Caribbean Initiatives Program, as a voluntary. She has been in Haiti 4 times in the last 2 years with this group. She testified that Haiti is not a safe place, and that her brother might not by safe there. Conditions are bad and there is no safety. On cross examination she sated that she was safe because it was a short visit and she was with a group at a hotel.

She is very proud of the respondent, since he was able to start 2 businesses to support himself. He lives in Atlanta and his house is worth between 80 and 85 thousand dollars.

Her mother has mental problems and is in total denial about Ralph. She thinks he is in the army. They do not tell her the truth, and she is on medication.

Ralph used to help his mother by buying things including food.

Her son, Andy, 21, wants to marry, and thinks so much of Ralph's opinion that he even brought his girlfriend to see Ralph while Ralph was detained. Andy thinks of Ralph as a good friend who he would miss greatly.

Ralph could not survive in Haiti, as his Creole is poor, and has no one to help him. He would have to live on the street.

Ralph always thinks of his family, children, and wife, not himself. He is worried that he will get sick like his mother because of his detention. His mother blames herself for Ralph's detention as he accompanied her to Haiti. She testified to this after saying that her mother thought he was in the army.

On cross examination she said, everyone makes mistakes, and they may still be a good person. When he was arrested, Jan was pregnant. He was a wonderful dad and husband. She learned of his criminal problems after the fact, and spoke to his attorney in Pensacola, and Ralph plead guilty to the charges.

On a second trip to Pensacola, Ralph's dad saw him, while he was awaiting trial. She did not know exactly what Ralph was convicted of, and was not aware that crack cocaine was involved. She did not know what the length of his probation was, and was not aware that he fled the police while on probation. Ralph never really explained to her what happened.

She said everyone makes mistakes, and they can still be a good person. This was repeated many times. She only talks positive things with Ralph. She did not know that he had a gun in the car when he was first arrested in Pembroke Pines, while taking kids to a game. She said that it was okay, however, because Ralph lived in a dangerous neighborhood where guns were necessary, Her father had a stroke, and, therefore, they did not tell him about Ralph.

Jan (his wife) was pregnant while he was in jail in 1991. Joanna now lives with her real mother, while Chris and Miriah live with Jan. Jan is under a great deal of stress due to Ralph's incarceration by the Service. She knows nothing about Mr. White, and did not know he was selling drugs to make money. She is afraid for Ralph, if he is forced to return to Haiti.

The respondent then testified regarding his request for Cancellation of Removal. On direct examination he testified calmly, quietly, and presented a very sympathetic case. He was a different person on cross becoming very abrasive, and evasive. On direct examination he testified that he came to the United States from Haiti, in 1968, at age 2. He has no memories of Haiti, but his first recollections are of Brooklyn where he was raised. He has 8 brothers and sisters. His father was a professor, and his mother a teacher. He grew up in Brooklyn in a close family. His parents did run into problems, marital, and his father left when he was about 6 years old. His mother had medical problems, so he moved in with aunt and uncle. They took him in to keep him out of trouble. He lived with his aunt and uncle in Florida, from age 13 to 16, (1984), when his aunt died. He went to school in Florida, and graduated

from North Miami Senior High, after dropping out of North Miami Beach High School His problems started after his aunt died. He speaks little Creole, and always thought he was a United States citizen. Most of his friends were American and not Haitians.

He testified that he registered with selective service, assuming he had been born in Brooklyn. He starting cutting school at age 17, using drugs and hanging around with the wrong people. He met a girl named Sharon, and had a child JoAnna. He started working at Wendy's to support his child. He never married Sharon. He then finished High School, and took courses at Miami Dade Community College. He started to have money problems, despite having two jobs, at Wendy's and with Miami Dade College, and he then began to sell drugs.

He lived in a tough neighborhood, Washington Park, where selling drugs was easy. After his break up with Sharon, JoAnna came to live with him. She lived with him after his release from jail, but she now lives with her mother because he is detained. He has a daughter with his wife, Miriam, and a stepson Chris. In 1992, he was released from jail and moved to Georgia to begin a new life. He did not want to go back to South Florida, and his brother Mark lived in Atlanta. He took various jobs, including selling flowers, and taking pictures. He made contacts and then opened a car wash. Business was slow in the winter, so he started a car detailing business, and a cleaning service. He started Exclusive Touch, which his wife still runs. However, many of the accounts have been lost, because of his detention. In 1997, he had 4 contracts and 10 employees. Today he only has one contract with Mr. Townsend who pre-

viously testified. He also had three employees at the detailing business, which he does not have today.

Life was good in Atlanta, and he got involved in the community, coaching and then becoming commissioner in the the North Cross Community. Chris quit baseball because his father was not there to coach, however, he is now trying out for football. Before his detention he worked Monday to Saturday, from 8 to 3:30. He was, therefore, able to spend time with his children. He would help them with their homework, help with the cooking and take them to the park. On Sunday they would go to church, eat and spend time together. He earned about $30,000, and his wife earned about $15,000. He started a snow cone business, from which he made about 5 to 7 thousand dollars. He brought the business for $2000, and paid $650 a month on season, and $400 off season. He lost the business after his detention.

Miriah and JoAnna were involved in sports. All the children have been effected by his detention. Chris is shy, and upset, and he has raised Chris since age 1. Miriah is always crying and misses him. He needs special reading classes, since he is not there to help read with him. JoAnna lives with her biological mother, since he is not there. She would prefer to live in Atlanta, and he is worried about the neighborhood in Florida, where she now lives. He can not control her since he is detained. Sharon is good woman, but they live in a bad neighborhood, where she is exposed to many things including men.

He testified that Janice is not doing well, and that she tried to commit suicide twice. She was hospitalized for a breakdown because he is not home. He calls home

twice a day to make sure that the children go to school, and get home okay. All his brothers and sisters and mom live in Florida. Prior to his detention he visited Florida to see his dad, who suffered a stroke. He died in January 1997. He has no family in Haiti. In 1996, they had a big Thanksgiving in Florida, for the entire family at a hall. There were 50 people. This was so good because it was his father's last Thanksgiving.

He is especially close to Karlie, who has helped to raise his youngest brother Jimmy. Jimmy attends Moore head College in Atlanta. Jimmy decided to go there because he (respondent), lived there and could help him. Ralph testified that he helped Jimmy, as well as Karlie's kids. Jimmy had a problem and he exercised a strong hand, verbally, to let him know that he should not get into trouble with the law. His mother is not doing well either. She feels that she is to blame, since was the one that wanted to go to Haiti to participate in a mass for he husband. His mother is like a child and needs care.

He testified that conditions in Haiti are bad, crowded, and smelly. You had to buy water, and outside of the hotel, Haiti is very bad and poor. He was shocked by what he saw. People are begging, and he could not support himself there.

He has an extensive criminal record, and he testified that he let his family down. All he wants to do now is help his family. He should be allowed to start a new life as he wants to. He regrets what he did. His entire family is here and he wants to see his daughter get married, and his sons to accomplish their goals. He has attempted to rehabilitate himself, and has serve the community. He would not repeat his mistakes as he has

a new community, and new friends. His second arrest for violating probation was a big mistake. He had no contact with that individual for over five years. While in Pensacola for Thanksgiving, he met him again and he asked for a ride. The police came behind him and he started to pull over. His friend said not to stop because there were drugs in the car. He did not know that his friend had drugs with him. The police did not prosecute him for the drugs, but violated his probation, and charged him with fleeing the police. He found out that the police had been watching his friend, and he was not involved. He has had no arrests since his release in 1994, following his probation violation.

He testified that Janice and the children would not move to Haiti if he were deported, therefore, his deportation would demolish the family. He stated that he had made bad choices in his younger years, and has tried to put that behind him. He wants to live the right life and not lie, and wants to always tell the truth. It is a life sentence if he is deported. Conditions in Haiti are bad, and it would be a tragedy for him and his wife if he were deported. She might even have another breakdown. She collapsed at work 2 months ago due to stress.

On cross examination the respondent testified that he was born in 1966, and came to this country in 1968. He understands Creole but does not speak it. His mother speaks Creole and some English. He has 6 older brothers and sisters who all speak Creole, though usually only with their mother.

He used marijuana for the first time in high school, 11th grade. He continued the use until college when he stopped. He used it almost everyday while in high

school. He never used any kind of cocaine including crack because it did not appeal to him. He sold powder cocaine beginning at age 20, while living in North Miami Beach. He purchased abut 1/8 gram and resold it in the neighborhood, to known individuals, never children. He did not consider it "selling," but simply an exchange. He did admit that he received money. He began selling crack cocaine in 1989. He did this because of a lack of money and his environment. He received crack from friends. He bought whatever he could afford. He admitted he was a drug dealer. He then began selling crack out of town. He bought drugs in North Miami Beach, and sold them in Pensacola. He took 1 oz. broke it up into $10 pieces (rock), and sold it for between $800 and $1000, for which he paid about $500. He would have someone else transport the drugs to Pensacola. Occasionally, he would sell it himself. He did this 5 or 10 times. He dealt with someone named Evelyn, last name unknown. She found him buyers. He sold at Truman Arms, a residential area at night. For abut two months in 1989 he sold drugs himself in Pensacola.

He then became a middleman supplying drugs to be sold in Pensacola. He met a Charles White who wanted the drugs. He learned that he could make a lot of money. His wife introduced him the Paula Warner, her cousin, who introduced him to Charles White. He was then questioned regarding his deposition taken in Mr. White's case ex. #19. His testimony with regard to this deposition was very unclear. He did not deny what was in the deposition, and in fact admitted that it was true., However, when asked direct questions, he was not sure of the facts. He did add certain facts. He testified that he went up to about 6 ounces, valued at between $5500

and $6500. He said that he saw Mr. White on 6 or 8 times, and paid others to take the drugs to Pensacola. Mr. Thevenin was an associate of his, who took drugs to Pensacola for him to give to Mr. White. The last time he took 17 ounces, about 581 grams, worth over $15,000. He made a couple of thousand on the deal. He does not know who the drugs were sold to. Mr. White received a 15 year sentence, while he got 5 1/2 years followed by probation.

He was concerned about his daughter JoAnna but sold drugs anyway. His daughter was in the car at the time of his arrest, and it upset her a lot. He did have a gun in the car but it was legally registered. He was sentenced to 5 1/2 years, but released in 1992. He then moved to Atlanta in March, living with his brother. Janice, Chris, and Miriah accompanied him. In November 1992, he was arrested for fleeing the police. He met a friend for no purpose, at a store, and then met him again the following morning. His friend asked for a ride to his girlfriend's house. This individual took a cab to his sister's house where he was staying. The respondent then gave him a ride. He was unable to explain why his friend did not simply take a cab to his girlfriend's house. The police stopped him and his friend, Tony told him not to stop because he (Tony) had drugs. He was scared so he did not stop immediately. His friend threw drugs out of the car. He stopped abut one block away. He was arrested released OR, and put back in jail. This hurt his family again.

When first arrested his mother visited, but was not told what actually happened. His first arrest was in 1984 for loitering, prowling, and carrying a concealed weapon. In 1985 he was arrested and plead to charges

involving marijuana, and in 1986 he plead to charges involving unlawful sale of cannabis. Both convictions were vacated. See exhibits 16 and 19.

When he was arrested for trafficking in cocaine, Janice was pregnant and he married her while in jail, and Miriam was born while he was still in jail. At the time of this arrest he was traveling with his daughter and his indicated address was that of his daughter, and her mother Sharon. He testified that he did not actually live with Sharon at that time, but that his name was on the lease.

He testified that he had no disciplinary problems in prison, or detention. The Service then introduced exhibit #21 a record of Discipline against the respondent, for smoking in unauthorized area. In addition he was transferred from Krome, after an altercation with an officer after visitation. He said that he was asked to strip for a search, and he refused because he had never been asked before. He says that he believes the officer was a homosexual. He became very upset in Court, and said that the District Director, and the Trial Attorney were treating him unfairly. He also had a problem in the cafeteria at Krome, with Carol West, who helped run the cafeteria. He testified that no one could agree with her. He said that he voluntarily left since she was not going to. He was actually disciplined for eating where he was not allowed to. He testified that everyone did it. His attitude was that this was not his fault.

He always lived with Janice after their marriage. He was asked about the one tax return which he submitted, indicated an address of 2263 Way, Atlanta, Georgia. This after he was asked where he lived in Atlanta, and he said, 2125 Willow Trail Drive, and 1127

Harbin Road. He first said, that well he stayed at different places when having problems with his wife. His wife, did not even know where that address was. Later he said the address was that of his partner, and he slept on the couch sometimes. He would spend a couple of days away, a couple of times. This tax return also shows him to be head of household, although he was actually married. He testified that his accountant filed it out, but interestingly, the page containing the preparers name, and his signature was not supplied. He filed separately because did not want to mix his business with his personal affairs. He testified that he has been mistreated by the Service, and that they should have released him.

Counsel for the respondent subpoenaed officers of the Immigration Service from Krome to testify regaring his behavior at Krome. The Court signed these, and the officers were available. However, after talking to these individuals., counsel elected not to call them.

The respondent has applied for Cancellation of Removal pursuant to section 240A(a) the Act. This section allows the judge to waive all grounds of inadmissibility, for an alien who has been a lawful permanent resident for 5 years, and has resided lawfully in the United States for seven years, prior to the commission of the acts which subject him to removal from the United States, and has not been convicted of an aggravated felony. This relief is discretionary in nature.

While the Court has found the respondent statutorily ineligible for the relief because he has been convicted of an aggravated felony, a full hearing was held based on the Board's remand. Even if statutorily eligible for the relief, the respondent still must demonstrate that he

merits, the relief as a matter of discretion. In *Matter of C-V-T-*, Int. Dec. 3342 (BIA 1998), the Board held that the standards developed to evaluate a waiver under the old section 212(c), are appropriate for the exercise of discretion under section 240A(a). The burden remains on the respondent to demonstrate that he merits the relief. The Court must balance the favorable factors, including, residence of long duration, hardship to the respondent or her family, property or business ties, service in the armed forces, service of value to the community, and any other factors attesting to her good moral character, against the adverse factors including the nature of the immigration violation, any criminal record, or other evidence of bad moral character. *Matter of Marin* 16 I&N Dec. 581 (BIA 1978). *Matter of Edwards*, 20 I&N Dec. 191 (BIA 1990), *Matter of Bascom*, 19 I&N Dec. 628 (BIA 1988).

In *Matter of Marin*, supra., the Board laid out the positive factors including residence of long duration, hardship to family member, business ties, property ties, employment and evidence of community service. In the instant case the respondent has resided in the United States for 30 years, having entered the United States an infant. He has extensive family, and business ties in the United States, even though there is no proof of taxes regarding these business.

The positive factor of his residence in the United States and family ties, must be balanced against the adverse factors, including her criminal and immigration record. *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978), *Matter of Edwards*, 20 I&N Dec. 191 (BIA 1990), *Matter of Bascom*, 19 I&N 628 (BIA 1988). The respondent's serious criminal conviction for trafficking in

cocaine requires outstanding or unusual equities as set out in *Matter of Buscemi*. The Service does not contest the fact that his residence, of 30 years since an infant is an outstanding equity. The Court concurs in this finding. However, a finding of outstanding equities does not automatically require that the relief be granted.

In the instant case the respondent has admitted, and the evidence establishes, that he was a drug dealer over along period of time. Even after being convicted he violated probation by associating with a friend involved with drugs. The serious adverse effects of drugs in this country has been noted by the Board in *Matter of U-M-*, 20 I&N Dec. 327, 330 (BIA 1991). The Board said, "The harmful effect to society from drug offenses has consistently been recognized by Congress in the clear distinctions and disparate statutory treatment it has dawn between drug offenses and other crimes." The definition of an "aggravated felony" under 101(a)(43), makes drug trafficking an aggravated felony, without any sentence, while many other crimes require a sentence of one year or more. The respondent no only has one conviction, but admits having been earning his living by selling drugs for a substantial period of time. This factor alone is enough to deny the relief as a matter of discretion.

The Court also finds that there are other discretionary factors, which must be considered. The respondent does have extensive family ties to this country, and would have a difficult time in Haiti. However, while his direct testimony was very moving, on cross examination his true colors came through. He testified on direct that he wants to live a true life with no lies. However on cross examination, he denied any discipli-

nary problems in jail or at Krome, when in fact he had more than one. While they may be minor offenses, he did not reveal them when asked. In addition he submitted only one tax return, and that was incomplete. This return also contains misinformation, in that he does not indicate that he was married. This may have resulted in a lower tax. He testified regarding his many businesses, but has produced no evidence, specifically tax returns relating to these businesses. His one return shows gross income of $27,180 from Exclusive Touch, yet he testified that he had 8 to 10 employees. There was a snow cone business with no evidence of a tax return. His own witness Mr. Clark testified that he paid the respondent $6,000 per year for cleaning 5000 square feet, and the Mr. Richardson had other customers, one of over 50,000 square feet. He has produced no evidence that this income was reported.

In addition, on direct examination he paints a picture of the ideal family. When confronted with his tax return indicating a different address, he says, that he spent time away from Janice when he had problems. He finally stated that the address was that of a partner where he sometimes slept on the couch. His explanation of what happened when he violated probation does not ring true. His friend Tony takes a cab to his sister in laws house, to ask for a ride to his girlfriend's house. His wife testified she did not want him to go because they were heading home to Atlanta. She also testified that he was suppose to take Tony to his hotel. It was not clear as to why they simply did not take Tony in the car and drop him off before heading for Atlanta. He also was unable to explain why if he had no knowledge of the drugs, he simply did not stop and explain this.

While the respondent's drug conviction in the 1980s were vacated in 1999 , the fact remains that at one point he plead to these charges, and now admits that he was doing drugs at that time. He has a long history of using and selling drugs. These cases must be considered in deciding whether to grant the relief as a matter of discretion.

In conclusion while the respondent has extensive family ties, and he and his family would suffer greatly if he were deported, he does not merit a waiver pursuant to section 240A(a) of the Act as a matter of discretion

Since the respondent has waived any other forms of relief the following orders will be issued:

It is hereby **ORDERED** that the Respondent's application for Cancellation of Removal pursuant to section 240A(a) of the Act be **DENIED**.

It is **FURTHER ORDERED** that the Respondent be REMOVED from the United States pursuant to sections 212(a)(2)(C), 212(a)(2)(A)(i)(II), and 212(a)(2)(B) of the Act.

Dated this 15th day of November 1999

KENNETH S. HUREWITZ
Kenneth S. Hurewitz
United States Immigration
Judge

[Seal Omitted]

US Department of Justice
Immigration and Naturalization Service

Miami District Office
7880 Biscayne Boulevard
Miami, Florida 33138

July 22, 1999

Ralph Richardson
C/O US INS
Krome Service Processing Center

Dear Mr. Richardson:

Please be advised that the Service has determined that you may be paroled from Service custody upon the posting of a bond in the amount of twenty-five thousand dollars ($25,000). This decision may not be appealed. If bond is posted in your behalf, the following conditions will apply:

- You present yourself at any and all immigration hearings concerning your case
- You advise EOIR and this office in writing of any change in residence within 5 days
- You present yourself at any and all requests of the INS
- You comply with any decisions made concerning your case

If you fail to comply with these conditions, the bond posted in your behalf may be breached.

Sincerely

SIGNATURE ILLEGIBLE
For Leroy Frederick
Assistant District Director
Detention and Deportation

Ralph Richardson File No: A 17 566 876

Date: JUL 20 1999

Pursuant to the authority contained in section 236 of the Immigration and Nationality Act and part 236 of title 8, Code of Federal Regulations, I have determined that pending a final determination by the Immigration Judge in your case, and in the event you are ordered removed from the United States, until you are taken into custody for removal, you shall be:

☐ detained in the custody of this Service.

☒ released under bond in the amount of $25,000.00.

☐ released on your own recognizance.

"Custody determination review based on the change in interpretation of Section 303(b)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)"

☒ You may request a review of this determination by an Immigration Judge.

☐ You may not request a review of this determination by an Immigration Judge because the Immigration and Nationality Act prohibits your release from custody.

/s/ CONSTANCE K. WEISS
(Signature of authorized officer)

Constance K. Weiss, Deputy ADD/DD&P
(Title of authorized officer)

Miami, Florida
(INS office location)

☐ do ☐ do not request a redetermination of this custody decision by an Immigration Judge.

☒ I acknowledge receipt of this notification.

ILLEGIBLE SIGNATURE (Signature of respondent) 7/21/99 (Date)

RESULT OF CUSTODY REDETERMINATION

On _____, custody status/conditions for release were reconsidered by:

☐ Immigration Judge ☐ District Director

☐ Board Of ImmigrationAppeals

The results of the redetermination/reconsideration are:

☐ No change - Original determination upheld
☐ Detain in custody of this Service.
☐ Bond amount reset to _____
☐ Release - Order of Recognizance.
☐ Release - Personal Recognizance.
☐ Other: _____

_____
(Signature of officer)

[Seal Omitted]

US DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

18201 SW 12th Street
Miami, Florida 33194

July 26, 1999

TO: Ralph Richardson, A 17 566 876
Krome Service Processing Center, Miami, FL

FROM: Edward A. Stubbs
Officer in Charge
Krome Service Processing Center

SUBJECT: Change in custody conditions, revocation of immigration bond

Dear Mr. Richardson,

Due to the recent receipt by the Service of unsealed certified records of convictions acquired from the State of Florida, which impacts heavily on your immigration status, your case has been reconsidered and your release on bond is no longer warranted.

Be advised that the previous bond of $25,000.00 is hereby revoked.

/s/ EDWARD A. STUBBS
Edward A. Stubbs,
Office in Charge, Krome SPC

(3)

No. 99-887

Supreme Court, U.S.
FILED
MAR 16 2000
CLERK

In The

Supreme Court of the United States

RALPH RICHARDSON,

Petitioner,

v.

JANET RENO, Attorney General, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF

ROBERT E. JUCEAM
Of Counsel

IRA J. KURZBAN*
HELENA TETZELI
KURZBAN, KURZBAN, WEINGER & TETZELI, P.A.
2650 S.W. 27th Avenue
Miami, Florida 33133
(305) 444-0060

Attorneys for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

1400

TABLE OF CONTENTS

Page

A. This Case Involves the Permanent Provisions of IIRIRA Not the Temporary or Interim Rules As In Other Cases Where *Certiorari* Has Been Denied 1

B. Petitioner Cannot Raise His Constitutional Claims of Unlawful Detention Before the Immigration Court or the Court of Appeals 3

C. The Abolition of the Writ of Habeas Corpus Has Profound Implications for Lawful Permanent Residents 5

D. *Richardson* Does Conflict With the Decisions of the Seventh and Fifth Circuits and Now Also Conflicts With the Third Circuit 6

E. INA §242(b)(9) Does Not Preclude Review Under the Writ of Habeas Corpus Because It Channels Review Only of Final Orders of Removal Not Detention Decisions 7

F. The Lower Court's Reading of INA §242(b)(9) as Abolishing the Statutory Writ of Habeas Corpus Would Overturn More than a Century of this Court's Jurisprudence 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Ex Parte Yerger, 75 U.S. (8 Wall) 332 (1869).....9, 10

Kwong Hai Chew v. Colding, 344 U.S. 590 (1953).... 3, 5, 9

Laguerre v. Reno, 164 F.3d 1065 (7th Cir. 1998), *cert. denied*, ___ U.S. ___ (Feb. 22, 2000)..... 3

Landon v. Plasencia, 459 U.S. 21 (1982)..... 9

Liang v. I.N.S., 2000 WL 264216, ___ F.3d ___ (3rd Cir. March 9, 2000).....3, 7, 10

Max-George v. Reno, 2000 WL 220502, ___ F.3d ___ (5th Cir. Feb. 24, 2000) 7

Mayers v. Reno, 175 F.3d 1289 (11th cir. 1999)..... 3

Pak v. Reno, 196 F.3d 666 (6th Cir. 1999)..... 3

Parra v. Perryman, 172 F.3d 954 (7th Cir. 1999).....6, 7

Rosenberg v. Fleuti, 374 U.S. 449 (1963) 5

Requena-Rodriguez v. I.N.S., 190 F.3d 299 (5th Cir. 1999)..... 3

Richardson v. Reno, 180 F.3d 1311 (11th Cir. 1999) ...*passim*

Swain v. Pressley, 430 U.S. 372 (1977).....4, 5

Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999).....6, 7

FEDERAL STATUTES

22 U.S.C. §2241.....7, 10

Immigration Reform and Immigrant Responsibility Act of 1996.....1, 3, 5, 6, 7

INA §236(a) 4

TABLE OF AUTHORITIES – Continued

Page

INA §236(b) 4

INA §236(c) 2

INA §236(e) 9

INA §242 ..... 6, 9

INA §242(a)(1) 9

INA §242(b) 7, 9, 10

INA §242(b)(9) 7, 8, 9, 10

INA §242(g) 10

FEDERAL REGULATIONS

8 C.F.R. §1.1(q) 2

8 C.F.R. §3.1(b)(7) 4

8 C.F.R. §3.19(h)(1)(i)(B) 2

OTHER AUTHORITIES

Matter of Daryoush, 18 I&N Dec. 352 (BIA 1982) 10

Matter of L, 4 I&N Dec. 556 (BIA 1951) 4, 8

Matter of Patel, 15 I&N Dec. 666 (BIA 1976) 10

Matter of U-M-, 20 I&N Dec. 327 (BIA 1991) 4, 8

PETITIONER'S REPLY BRIEF IN SUPPORT OF CERTIORARI

Ralph Richardson, now detained almost 2½ years without a bail hearing, seeks to review the lower court's interpretation of the *permanent* provisions of the Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") because those provisions prevent a neutral magistrate from determining bond, and the construction of the permanent provisions by the lower court prevents the judicial review of the constitutionality of the deficient bond procedure.

After previously agreeing that the Eleventh Circuit's decision should be vacated and remanded, the Respondents now oppose *certiorari* based upon the erroneous view that this case involves "interim" and not permanent provisions of IIRIRA, and upon the mistaken view that Mr. Richardson's constitutional claim for a bond hearing as a lawful permanent resident is the same as the underlying merits of his removal proceeding. The Petition for *Certiorari* should be granted because this case involves significant issues concerning the interpretation of the *permanent* provisions of IIRIRA and lasting questions of national importance regarding the continuing availability of the "Great Writ" to challenge unlawful detention that cannot, and will not, be addressed in Mr. Richardson's removal proceeding.

A. This Case Involves the Permanent Provisions of IIRIRA Not the Temporary or Interim Rules As In Other Cases Where *Certiorari* Has Been Denied

1. The Respondents claim that this case involves the "interim provisions" of IIRIRA (Resp. Opp. at 2). They claim further that because Mr. Richardson was stopped as an "arriving alien" entering the United States while the Temporary Period Custody Rules ("TPCR") were in effect that the case has "little prospective significance" (Res.Opp. at 15) because the TPCR has expired and all criminal aliens who are in the United States "are now covered by the

mandatory detention provisions." (Res.Opp. at 15-16). The Respondents' analysis is seriously flawed and is based upon a fundamental misunderstanding of both the law and Mr. Richardson's claims.

First, the expiration of the TPCR has no effect on the issues raised in this petition. As the Respondents acknowledge, the same restriction on the Immigration Judge's review of a District Director's custody determination concerning arriving aliens "remains in force at 8 C.F.R. §3.19(h)(1)(i)(B)" after the expiration of the TPCR (Res.Opp. at 6 n.2). It was the regulatory restriction both during and after the expiration of the TPCR that prevents Mr. Richardson from a bond hearing before a neutral magistrate. The expiration of the TPCR has no effect on Mr. Richardson being characterized as an "arriving alien" under 8 C.F.R. §1.1(q) and his being denied the right to a bail hearing before a neutral magistrate under 8 C.F.R. §3.19(h)(1)(i)(B). Both provisions remain in effect and both prevent Mr. Richardson from receiving a bail hearing.

Second, the existence of mandatory detention under INA §236(c) does not alter the immediate importance of this case to lawful permanent residents deprived of a bond hearing. Mandatory detention does not apply to any person who was released from criminal detention prior to October 10, 1998 – the effective date of INA §236(c) (Res.Opp. at 5 n.1). Thus, the Respondents' claim that the distinction between "arriving aliens" with criminal records and those in the U.S. "has lost much of its significance" because all persons with criminal convictions are now detained (Res.Opp. at 17) ignores, what Respondents have acknowledged to be an entire class of persons with criminal records, such as Mr. Richardson, whose convictions pre-date the mandatory detention provisions. Such persons, involving thousands of cases, are not subject to mandatory detention but *are* affected by the continuing refusal to grant bond hearings. Thus, while this case may not address the question of mandatory detention, it does address constitutional violations in the treatment of lawful permanent residents under the *permanent* provisions of

IIRIRA, in contravention of this Court's decision in *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953). Persons such as Mr. Richardson, with "old" convictions remain subject to detention without a bond hearing before an immigration judge when they are stopped at the borders of the U.S.

Third, the Respondent's claim that the case does not involve the permanent provisions under IIRIRA but only "interim" rules (Res.Opp. 2, 15) that have little importance is belied by the lower court's decision and by every other circuit court that has addressed *Richardson*. The lower court was clear that it was addressing the permanent provisions of IIRIRA, not the interim rules. *Richardson v. Reno*, 180 F.3d 1311, 1313 n.2 (11th Cir. 1999) Petitioner's Appendix to Petition for Writ of Certiorari (Pet.App.) at 4 n.2 ["At the outset, we note that *Richardson* remains one of the few circuit court decisions where only post-IIRIRA law, as opposed to the transition rules, applies."]; *Mayers v. Reno*, 175 F.3d 1289, 1297 n.9 (11th Cir. 1999) Other circuits have agreed that *Richardson* addresses post-IIRIRA decisions and not the TPCR or "interim" rules. *Liang v. I.N.S.*, 2000 WL 264216, ___F.3d___ (3rd Cir. March 9, 2000) [Recognizing that *Richardson* is a permanent rule case and *rejecting* its analysis]; *Pak v. Reno*, 196 F.3d 666, 672 n.6 (6th Cir. 1999); *Requena-Rodriguez v. I.N.S.*, 190 F.3d 299, 310 n.36 (5th Cir. 1999).[1]

B. Petitioner Cannot Raise His Constitutional Claims of Unlawful Detention Before the Immigration Court or the Court of Appeals

2. The Petitioner's claims regarding the unconstitutionality of his treatment before INS cannot be raised in

---

[1] In this respect, *Richardson* differs from the cases where *certiorari* has been denied because they involved habeas corpus challenges to removal proceedings (not detention) under the interim (not permanent) provisions of IIRIRA. *See e.g., Laguerre v. Reno*, 164 F.3d 1065 (7th Cir. 1998), *cert. denied*, ___ U.S. ___ (Feb. 22, 2000).

his removal proceeding or in the Court of Appeals notwithstanding Respondents' suggestion to the contrary. Res.Opp. at 18. Respondents contend that Mr. Richardson "has the opportunity in his removal proceedings" to raise the issue concerning his treatment as an "arriving alien." (Res.Opp. at 18). Petitioner's claims, however, are constitutional in nature and cannot be addressed within the context of his removal proceedings because constitutional claims cannot be raised before the agency. *Matter of U-M-*, 20 I&N Dec. 327 (BIA 1991); *Matter of L*, 4 I&N Dec. 556 (BIA 1951).[2]

The assertion that this Court should not intervene because Petitioner's claims "may be raised later on review of a final order of removal" (Res.Opp. at 19) is also in error. If Respondent must wait until there is a final order of removal to review the constitutionality of his detention pending a final order then he has no meaningful review of his detention. *See Swain v. Pressley*, 430 U.S. 372, 381 (1977). If the Respondents' position was adopted it would mean that no review of Mr. Richardson's detention would occur until the Court of Appeals rules on the merits of his removal case. Even the lower court recognized the inconsistency in this position and searching for a response simply asserted that the lower court *could* establish a procedure to allow review at the court of appeals immediately prior to its decision on the merits. *Richardson* at Pet. App. 16 n.12. This, of course, does not meet the *Swain* standard.

---

[2] The Respondents are equally in error that Petitioner may obtain review of the district director's decision regarding the revocation of his bond before the Board of Immigration Appeals. (Res.Opp. at 28). The regulations do *not* provide for an appeal to the BIA of a decision by the district director to revoke bond under INA §236(b). *Compare* 8 C.F.R. §3.1(b)(7) relating to review of bond decisions under INA §236(a). Here, as Respondents acknowledge Mr. Richardson's bond was revoked. (Res.Opp. at 15 n.6).

C. The Abolition of the Writ of Habeas Corpus Has Profound Implications for Lawful Permanent Residents

3. The abolition of the Writ of Habeas Corpus to challenge unlawful detention under post-IIRIRA cases does not have, as Respondents claim, "little ongoing significance in the detention context" (Res.Opp. at 19). The abolition of the Writ of Habeas Corpus in the Eleventh Circuit to review INS detention decisions has continuing profound consequences for U.S. citizens unlawfully detained as non-citizens, aliens detained based on their race or nationality, or persons otherwise detained in violation of the Constitution as is Mr. Richardson. This case is not an oddity. There are thousands of returning lawful permanent residents, not subject to mandatory detention, who are deprived of the right to a bond hearing solely because they were stopped at the border instead of stopped in the United States. Even though their trips were "brief, casual, and innocent" and not "meaningfully interruptive" of their residence status under *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), they are now subject to detention for prolonged periods of time without the right to have a bail hearing before an impartial magistrate. This distinction violates *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953) and results, as this case plainly indicates, detention that may continue for *years*. The Respondents' remedy (and that of the lower court) that Mr. Richardson and others unlawfully detained should simply wait until the end of their removal proceedings for appellate review provides no protection against prolonged unlawful detention and violates the command of *Swain v. Pressley*, 430 U.S. 372, 381 (1977) that there must be an adequate alternative remedy to test the validity of detention.

D. *Richardson* Does Conflict With the Decisions of the Seventh and Fifth Circuits and Now Also Conflicts With the Third Circuit

4. The Respondents' claim that the lower court's decision is not in conflict with *Parra v. Perryman*, 172 F.3d 954 (7th Cir. 1999) or *Zadvydas v. Underdown*, 185 F.3d 279 (5th Cir. 1999) is in error. Both cases raise the continuing viability of the writ of habeas corpus concerning detention matters under the *permanent* provisions of IIRIRA. *Parra*, 172 F.3d at 955 ["Because this proceeding began after April 1, 1997, it is governed by [IIRIRA] . . . We therefore use the new statutory terminology . . . avoiding the complex transition issues that affect some older cases]; *Zadvydas*, 185 F.3d at 186 ["The parties agree that . . . this case is governed by the new section 241 established by the IIRIRA."]. In both *Parra* and *Zadvydas*, unlike *Richardson*, the circuit courts concluded that the writ of habeas corpus remained to challenge *detention* issues and was not eliminated by the passage of IIRIRA as the Eleventh Circuit determined. Further, the decision in both cases specifically recognized that *detention* issues are separate and apart from removal proceedings thus rejecting the fundamental premise in *Richardson* that review must be in the court of appeals because "detention [is] the first step in the removal process." *Richardson*, 180 F.3d at 1318 (Pet. App. at 16). *Compare Parra*, 172 F.3d at 957 ["His claim concerns detention while the administrative process lasts, and it may be resolved without affecting pending proceedings"]; *Zadvydas*, 185 F.3d at 285 [citing to above analysis in *Parra*]. Although *Zadvydas* arose in the context of indefinite detention, the Respondents' efforts to distinguish the case on those grounds amounts to a distinction without a difference. In both *Parra* and *Zadvydas* the issue, for jurisdictional purposes, is that detention is separate and apart from the removal proceedings and therefore not governed by the exclusive review provisions of INA §242.

After Mr. Richardson filed his Petition for *Certiorari* and the government responded, the Third Circuit Court of

Appeals issued its decision in *Liang v. I.N.S.*, 2000 WL 264216, ___F.3d___ (3rd Cir. March 9, 2000). In *Liang*, the Third Circuit addressed the issue of whether the district courts continue to have jurisdiction under the statutory writ of habeas corpus, 28 U.S.C. §2241 where the issues arise under the permanent provisions of IIRIRA. The *Liang* court specifically rejected the Eleventh Circuit's analysis in *Richardson* that INA §242(b)(9) as well as the "overall judicial review scheme enacted in INA §242(b)," precluded review under the statutory writ of habeas corpus. *Liang*, 2000 WL 264216 *10-12. The Third Circuit found that the lower court's reading in this case "that Congress need not mention habeas or §2241 to repeal the district courts' habeas jurisdiction" is "at odds" with the Third Circuit's reasoning and that of other courts of appeals. *11. It further held that such a reading is contrary to the historical significance that this Court has given to the writ. *10-11. Because *Liang* specifically rejects the central holding of *Richardson* that INA §242(b)(9) abolishes the writ of habeas corpus, and because *Richardson* specifically conflicts with the Seventh Circuit in *Parra* and the Fifth Circuit in *Zadvydas*[3] regarding the continued existence of habeas corpus jurisdiction as it relates to *detention*, this Court should resolve the conflict among the circuits.

E. INA §242(b)(9) Does Not Preclude Review Under the Writ of Habeas Corpus Because It Channels Review Only of Final Orders of Removal Not Detention Decisions

5. The Respondents also err in believing that INA §242(b)(9) precludes habeas corpus review of detention

---

[3] Although the Fifth Circuit recently decided that the statutory writ of habeas corpus in the district court was abolished in the review of a permanent rule case, *Max-George v. Ren*, 2000 WL 220502, ___ F.3d ___ (5th Cir. Feb. 24, 2000), that case did not address the question of *detention* but rather the review of a final order.

decisions. The Respondents' analysis, like that of the lower court, is deeply flawed because it confuses the appeal of issues that arise in removal proceedings with detention pending removal. Res.Opp. 20-22. It reaches this conclusion by ignoring the INS' own regulations, statutes, and administrative interpretations that have existed for decades clearly delineating and separating issues concerning detention from deportation or removal. *See* Petition for *Certiorari* at 4-5. It seeks unsuccessfully to intertwine the issues of detention and removal by suggesting that both turn on the question of whether Mr. Richardson is an "arriving alien". Res.Opp. at 23. However, the core of Mr. Richardson's claims are *constitutional* ones involving whether due process permits a lawful permanent resident to be detained without a custody hearing before an adjudicator independent of the INS, and whether a lawful permanent resident may receive differing treatment as to the procedures governing bond merely because he briefly left the country. These issues, unlike questions concerning Mr. Richardson's "arriving alien" status, cannot be addressed or decided in removal proceedings. *Matter of U-M-*, 20 I&N Dec. 327 (BIA 1991); *Matter of L*, 4 I&N Dec. 556 (BIA 1951). Despite the Respondents' assertion that Mr. Richardson's claims are "derivative" of his "arriving alien" status, Res.Opp. at 21 n.11, his due process claims exist independent of whether he was properly classified as an arriving alien.[4]

---

[4] Respondents also curiously claim that Petitioner's analysis of INA §242(b)(9) would permit collateral attacks on removal proceeding because the Court's determination on questions concerning bond would result in the dismissal of the underlying removal proceedings on the same grounds. Res.Opp. 23. But why is that so? As detention is separate from removal, a decision that due process require that Petitioner should receive a bond hearing before a neural magistrate, as due other lawful permanent residents, does not mean that the distinction between inadmissible and deportable aliens for purposes of removal proceedings does not continue to exist.

The Respondents' analysis, like that of the lower court, also ignores the language and context of INA §242. Congress passed INA §242 to clarify the procedure to use in the review of *final orders* of removal. INA §242(a)(1). It further set forth certain "requirements" regarding the review of *final orders* not detention. INA §242(b). It established separate preclusion provisions for review of detention under INA §236(e). INA §242(b)(9) would render INA §236(e) superfluous by folding detention decisions into removal proceedings on the theory that detention decisions involve "any action taken or proceedings brought to remove an alien" under INA §242(b)(9). *Richardson*, 180 F.3d at 1318, Pet. App. at 16. The Respondents suggest that INA §242(b)(9) does not render INA §236(e) superfluous because various constitutional challenges to detention, including the claim that detention was based upon a constitutionally impermissible fact such as race, would remain. Res.Opp. at 24 n.14. However, Petitioner here *has raised* constitutional claims asserting that due process requires an independent adjudicator and that the mere physical location of a lawful permanent resident cannot prevent his assertion that he is protected by the due process clause. *See, Landon* and *Kwong Hai Chew.*

F. The Lower Court's Reading of INA §242(b)(9) as Abolishing the Statutory Writ of Habeas Corpus Would Overturn More than a Century of this Court's Jurisprudence

6. Respondents acknowledge that INA §242(b)(9) contains no language limiting habeas corpus review. Res.Opp. at 24-25. They erroneously claim, however, that this Court has not said that such limiting language is necessary to limit habeas corpus review. *Id.* But in *Ex Parte Yerger*, 75 U.S. (8 Wall) 332 (1869) this Court said exactly that in finding that habeas extends to all cases

---

Indeed, this Court has already settled that issue. *Landon v. Plasencia*, 459 U.S. 21 (1982).

except those "expressly excepted from it." *Yerger*, 75 U.S. at 337. Nor does INA §242(b)(9) even contain the "notwithstanding any other provision of law, no court shall have jurisdiction" language found in INA §242(g) that might suggest an implied repeal of habeas corpus jurisdiction. Its narrow scope and focus as a "requirement" of the review of a *final order* of removal under INA §242(b) simply does not suggest that habeas corpus review of detention pending a final order has been eliminated.[5] The Third Circuit in *Liang* was therefore correct in rejecting the analysis in *Richardson* and the Government's invitation to adopt it, when it concluded that "had Congress intended to eliminate all habeas jurisdiction under §2241, it would have done so by making its intent explicit in the language of the statute." *Liang* *11.

CONCLUSION

The Writ of Certiorari should be granted and the case remanded to the district court for an order granting Mr. Richardson release from detention pending a final determination in his removal proceeding.

Respectfully submitted,

IRA J. KURZBAN, Esq.

---

[5] The Respondents again seek to weave issues involved in a final order and subject to review under INA §242(b)(9) with unrelated bond issues by applying an inappropriate "reason to believe" standard to the bond decision. This standard has never been applied to bond decisions, was not applied here (Resp.App. 5a-8a, 61a-65a) and would be inappropriate to do so. The appropriate standard addresses whether the person is a threat to society or likely to abscond. *Matter of Patel*, 15 I&N Dec. 666 (BIA 1976); *Matter of Daryoush*, 18 I&N Dec. 352 (BIA 1982). Neither of these issues relates to whether the Respondent is deportable on the charges made. Their separate review thus does not affect the removal proceeding.